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The choice of law to a transnational employment contract – What China could learn from the rules in the EU?

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Abstract

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Abstract:

This thesis focuses on the choice of law rules in a transnational employment contract. The research object is the new law published in China in 2010, which will be provided an observation on the law content, empirical research on the implementation and practical issues in China, and a comparative study of the rules in the EU to provide potential helpful suggestions on improving the choice of law rules in China.

In the disputes arising from the employment relationship which has foreign factors, e.g., foreign employers, foreign workers, posting workers overseas, etc., the applied law to the case is one significant issue in the field of private international law. Such rules in China were not unified in law until the establishment of the *Law of the PRC on the Laws Applicable to Foreign-related Civil Relations* (LAL). However, the empirical research shows that although the transnational employment contract disputes in China increase in the last decade, the implementation of LAL still meets obstacles from the courts' lack of attention to the foreign-related factors, poor knowledge of using LAL appropriately, etc. Besides, the flaws of law content, e.g., obscure terms, no specific distinguishment from the collective agreements, controversial understanding of mandatory provisions, lack of party autonomy and practical use of closest connection principle, etc., lead to academic concerns.

With a comparison of such rules in EU, some suggestions are provided, for example, allowing the party's choice, which could be limited by introducing objectively applicable law; clarifying the obscure terms, e.g., working place, business place, etc.; putting the closest connection principle in a practically useful position; etc. However, due to the current obstacles, some suggestions may not be accepted currently. Besides, with many important external factors, e.g., the impact by the new PRC Civil Code, the One Belt One Road Initiative, the Covid-19, etc., the improvement of the choice of law rules in China is necessary and would meet more challenges in the future.

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LIST OF ABBREVIATION

CJEU	Court of Justice of the European Union
EU	European Union
GPCL	General Principles on Civil Law of the PRC
LAL	Application of Law for Foreign-Related Civil Legal Relationships of the People's Republic of China
MOHRSS	Ministry of Human Resources and Social Security of the PRC
OBOR	One Belt One Road Initiative
PCC	PRC Civil Code
PIL	Private International Law
PRC	People's Republic of China
PWD	Posted Worker Directive

1. Introduction

Imagine you are a Chinese worker working in a French company in Paris. If you are wrongly dismissed or meet any discrimination in your job, could you file your employment claims to the courts in China since you still have Chinese nationality? Is the French law or Chinese law applied to your employment dispute case?

Or, imagine a Chinese worker dispatched by a Chinese company to work in France for an international project. The worker is under the management and control of the French company, while he or she gets salary payment from the Chinese company. Who is the worker's employer? When the worker falls into labor disputes about his work, e.g., statutory right disputes including sex or age discrimination, contract rights including holiday or overtime pay, or when he or she gets a work-related injury, which company shall he claims for liability and to authorities in which country shall he submit claims? During the judicial process, what law shall be referred to decide the ultimate responsible party and any other substantive law matters? Could the judgment be enforceable in both France and China?

The above questions could not find any solution in a purely French or Chinese domestic employment law, since they are the discussed target of the problem. Here shows the value of private international law's being introduced in employment matters. Unlike pure domestic matters, transnational disputes have links to more than one country, which bring contradictions also to the governing law and jurisdictions except for the substantive law problems. Therefore, the private international law (PIL) is designed to solve the problems, which creates the rules to denote the applicable law and the jurisdiction in advance, as well as designs rules to ensure the effective enforcement of foreign judgment and the legal ways for the whole process. For example, the jurisdiction in PIL deals with the overlapped or contradicted judicial authorities in countries. The recognition and enforcement of foreign judgments, taking of evidence, etc., are focusing on the procedural matters during and after the judicial process.

Among the different rules, the choice of law is one of the most necessary and useful matters in private international law, which usually takes up the longest part. After series of issues,

e.g., jurisdiction, classification,[1] etc., the parties will meet their next main question: what is the governing law of the case? The choice of law rules are generally the provisions in the country's PIL which deal with conflicts on the applicable law for foreign-related cases.

The choice of law rule for employment contracts in the European Union has a long history since 1980, which are partly learned by China in designing its private international law. However, if we look deeper into China's private international law, on the one side, there are little researches on the practical implementation of the choice of law rules since its establishment in 2010; and on the other side, there are still many flaws in the rule design. Therefore, this thesis will seek for observation on the rule design and practical implementation of the choice of law rules to the transnational employment contract in China, and propose the potential improvement suggestion for China through analyzing and comparing the rules in China and EU.

Before we dive into the main content, some significant definitions shall be clarified for this thesis first.

Contractual Claims, Statutory Claims, and Tortious Claims

According to the nature of the discussed disputes, the claims could be divided into contractual claims, statutory claims, and tortious claims.[2] The contractual claims arise from the disputes of breaching the contracts, while the statutory claims deal with the right and obligation entitled by the law. Tortious claims, which could be told from the literary meaning, are dealing with tort disputes.

In the field of PIL, the disputes about the employment contract fall into the range of contractual claims, e.g., the disputes about illegal dismissal, unpaid remuneration, violation of non-compete or non-interest-conflict obligations. The contractual claims in the PIL generally also include consumer contracts, insurance contracts, etc. On the other hand, the infringement or torts, e.g., physical injury or economic loss arising in the employment, could be also filed as a tort claim. Additionally, the statutory claims in PIL (sometimes may be

[1] Classification, sometimes also called as characterization or qualification, is one significant definition in the private international law, which is to determine the nature of the action or the dispute. It is a precondition for the choice of law.
[2] Grušić, U. (2015). 137.

called “non-contractual claims”) include matters of succession, family law, the law of property, etc.

The thesis will focus on the first type: contractual claim due to the breach of employment contract, while the other two types of claims are not in the discussed scope.

Transnational VS Foreign-related

To denote the applied scope and objects of the choice of law rules in PIL, China uses the term “foreign-related” in its name of private international law code, while the conventions and regulations in EU use “other member state” or “other country” in the provisions indicating the “foreign” factor. These terms all refer to the same object: the employment relationship which has a connection to more than one country.[3] Therefore, this thesis borrows Ugljesa Grusic’s definition of the “transnational employment relationships” and uses “transnational” to cover the subjects of the PIL in China or the EU.

What shall be noted is that the disputes arising from employment contracts with connections to Hong Kong or Macau could be also dealt with in the discussion range of the thesis. Based on the Supreme People’s Court’s interpretation, since Hong Kong and Macau have their own regional law systems, even though they are not “transnational” regions outside China, the relevant issues could still be solved referred to the PRC private international law in China.

Employment Contract

The “employment contract” in this thesis generally covers all the employment relationships, including those with written employment contracts, verbal employment contracts, and even actual employment relationships. It is also a controversial issue that will be discussed in the thesis further that in China, the written employment contract is mandatory and any actual employment relationship without employment contracts would not get full protection as others.

Also, the employment contract discussed here includes all working patterns, e.g., full-time, part-time work, and all kinds of the employment relationship, e.g., between the worker with a foreign enterprise, organization, branch, affiliate, etc. The different employment patterns

[3] Ibid, 1.

include workers posted overseas, workers hired for foreign businesses, workers working in different territories of countries, international transport workers, etc.[4]

With these preconditions, the thesis will deal with the research question that how are the choice of law rules to transnational employment contracts implemented in China? Is there any practical potential improvement with learning from the EU?

The thesis will begin with the description of the current rules in private international law in China in Chapter 2. Especially, the rules for three special and significant groups will be discussed separately: the labor dispatch workers, foreign workers in China, and the seamen. In Chapter 3, empirical research that offers a general overview on the implementation situation of the rules in China since 2010 and the academic discussion by the scholars in China will be provided. The statistics and judgments about the transnational employment disputes will be analyzed, as well as some empirical researches by the Chinese scholars will be concluded. The second main part, i.e., Chapter 4, deals with the relevant rules in the EU, which are based on series of regulations. The third main part, beginning in Chapter 5, will point out the good experience that may be learned from the EU. Some of the suggestions are also provided discussion about the feasibility in China. Besides, other considerations about China's PIL development will be provided, including its connection to the One Belt One Road Initiative (OBOR), the PRC Civil Code, the necessity of a specific substantive law to protect the right of the overseas workers, etc. Finally, the thesis concludes with the improvement suggestion and the expectation for China's choice of law rules.

The thesis is completed with the qualitative research through the literature, reports, legislations, and cases in both of EU and China, and the empirical research on the implementation of the rules.

[4] Ibid.

2. Choice of law to a transnational employment contract in China

The increasing issues about transnational employment in China rose in the recent decades, especially with the exploding development of China's economic increase and its participation in international trade and commercial communication since 2000. At first, the relevant employment disputes are mainly governed by different diverse rules in various legislation and regulations. Since 2010, China established its own choice of law rules: *Law of the PRC on the Laws Applicable to Foreign-related Civil Relations* (LAL), which provides a systematical framework for the transnational civil and disputes in China.

2.1 Before LAL in 2010

The first appearance of the choice of law rules in China's early history dates back to the *Tang Code* during the Tang Dynasty (618-907), with only one provision stipulating that a case involving persons subject to the same foreign sovereignty shall be governed by the law of the said sovereignty, while the case involving persons from different foreign sovereignties shall refer to the Tang Code.[5] This is the earliest relevant record found in old China.

After the establishment of the People's Republic of China (PRC) in 1949, private international law did not have much development in the first three decades.[6] During this period, the relevant record of the choice of law in China was only found in the rules governing property referring to consular treaties, e.g., the *1959 Sino-Soviet Consular Treaty*.[7]

The basic rules and principles of the choice of law in modern China appear through the *General Principles on Civil Law of the PRC* (GPCL) in 1986 and the interpretation by the Supreme People's Court (GPCL Interpretation)[8] in 1988.[9] Through 8 provisions in GPCL, some major civil matters are given the rules of choice of law, including the immovables,

[5] Han, D. (2000).
[6] He, Q. (2010). 188.
[7] Zhang, M. (2005). 289.
[8] Opinions of the Supreme People's Court on Certain Issues Concerning the Implementation of the 'General Principles on the Civil Law of the People's Republic of China' (Trial).
[9] The 1986 GPCL and 1988 interpretation are abolished since Jan. 1, 2021 due to the establishment of PRC Civil Code.

contracts, tort, marriage, succession, etc.[10] The GPCL was modified in 2009 with no changes in the foreign-related field provisions.

The GPCL Interpretation supplements and provides definitions about foreign-related matters through Article 178 to 192. For example, it defines the "foreign-related civil relations" as circumstances where either of or both parties in a civil legal relationship is an alien, stateless person or a foreign legal person; the object of the relationship is within the territory of a foreign country; the legal facts that produce, alter, or annihilate the civil relations of rights and obligations occur in a foreign country.[11] In the same provision, it also emphasizes that the courts in China shall consider the applicable substantive law according to the rules of GPCL during judging the foreign-related civil cases. The GPCL Interpretation was modified in 1990, which only added one provision for choice of law to guarantee the power of the judging authority that it has the final power to interpret and decide the applicable law when there are different ways to interpret.[12] It also modified the rules about the ascertainment of foreign law.[13]

There are no specific rules for the transnational employment contract in both the GPCL and GPCL Interpretation, but Art. 145 of GPCL provides a possibility for parties in foreign-related contracts to choose the applicable law unless there are other limits in the laws and regulations. With the absence of the party's choice, the closest connection principle will be applied.[14] However, the controversial questions that whether employment contracts shall be considered as one type of contract and whether to apply the general rules for contracts to the employment contracts hinder the application of this provision to the practical cases.

There is also one document issued by the Supreme People's Court in 2007 providing some useful interpretation: *Rules on the Relevant Issues concerning the Application of Law in Hearing Foreign-Related Contractual Dispute Cases in Civil and Commercial Matters*.[15] For example, it is stipulated that the choice of law to foreign-related civil or commercial

[10] Art. 142-150 of GPCL.
[11] Art. 178 of GPCL Interpretation.
[12] Art. 223 of GPCL Interpretation.
[13] Art. 222 of GPCL Interpretation.
[14] Art. 145 of GPCL: "The parties to a Contract involving foreign interests may choose the Law applicable to settlement of their Contractual disputes, except as otherwise stipulated by Law. If the parties to a Contract involving foreign interests have not made a choice, the Law of the country to which the Contract is most closely connected shall be applied."
[15] Abolished since April 8, 2013 as contradicted with the LAL.

contracts shall be made in an explicit manner;[16] under the circumstance to decide the law with the closest connection, the special character of the contract and many other factors, e.g., whether the performance of contractual obligations by one party could at the best level embody the essential characteristic of the contract, shall be taken into consideration.[17] Many types of contracts are provided the choice of law rules, including the sales contracts, insurance contracts, contracts on leasing of movables, etc.[18] These rules also play a great role in the structural design of the LAL. Unfortunately, employment contracts are not specifically mentioned in this document, either.

To make a short conclusion of the legislative situation of the choice of law for transnational employment contracts in China, there are no specific laws or provisions in this field. The GPCL, GPCL Interpretation, and the other above-mentioned documents form the general base of the choice of law rules, while the specific rules for the transnational employment contracts are still missing. In practice, the relevant cases in this phase are mostly directly governed by the Chinese domestic laws without discussing the foreign-related factors, because there is still low awareness of choice of law rules and even of the private international law.

2.2 The existing rules with the effective LAL

To clarify the choice of law rules concerning the transnational civil relations, to solve the transnational civil disputes, and to protect the rights and interest of the parties, the *Law of the PRC on the Laws Applicable to Foreign-related Civil Relations* was issued on October 28, 2010, and effective as of April 1, 2011. It could be recognized as a significant part of structuring the private internal law code in China, as it is the first specific legislation focusing on the choice of law rules. LAL has 8 chapters in total, which including 52 provisions. The law provides the choice of law rules in the many civil subjects, including marriage and family, inheritance, real right, creditor's rights, intellectual property rights, etc.

The employment contract is included in the section "Creditor's Rights", written in Article 43: "The laws at the working locality of laborers shall apply to labor contracts; if it is difficult to determine the working locality of a laborer, the laws at the main business place of the

[16] Ibid, Art. 3.
[17] Ibid, Art. 5.
[18] Ibid.

employer shall apply. The laws at the dispatching place of labor services shall apply to labor dispatches." Except for the specific rules on employment contracts, there are also general rules and principles. Article 4 of LAL shows that the Chinese mandatory provisions on foreign-related civil relations prevail in the application. Article 5 mentions the public policy consideration that the Chinese laws shall apply if the application of foreign laws damaging the social public interest of China.

The Supreme People's Court issued an interpretation on LAL (LAL Interpretation)[19] on Dec. 28, 2012. The interpretation supplements some important matters in the choice of law rules. For example, with Article 1, the foreign-related civil relationship is provided four examples: "(1) either party or both parties are foreign citizens, foreign legal persons or other organizations or stateless persons; (2) the habitual residence of either party or both parties is located outside the territory of the People's Republic of China; (3) the subject matter is outside the territory of the People's Republic of China; and (4) the legal fact that leads to establishment, change or termination of civil relationship happens outside the territory of the People's Republic of China." There are also (5) including other circumstances.

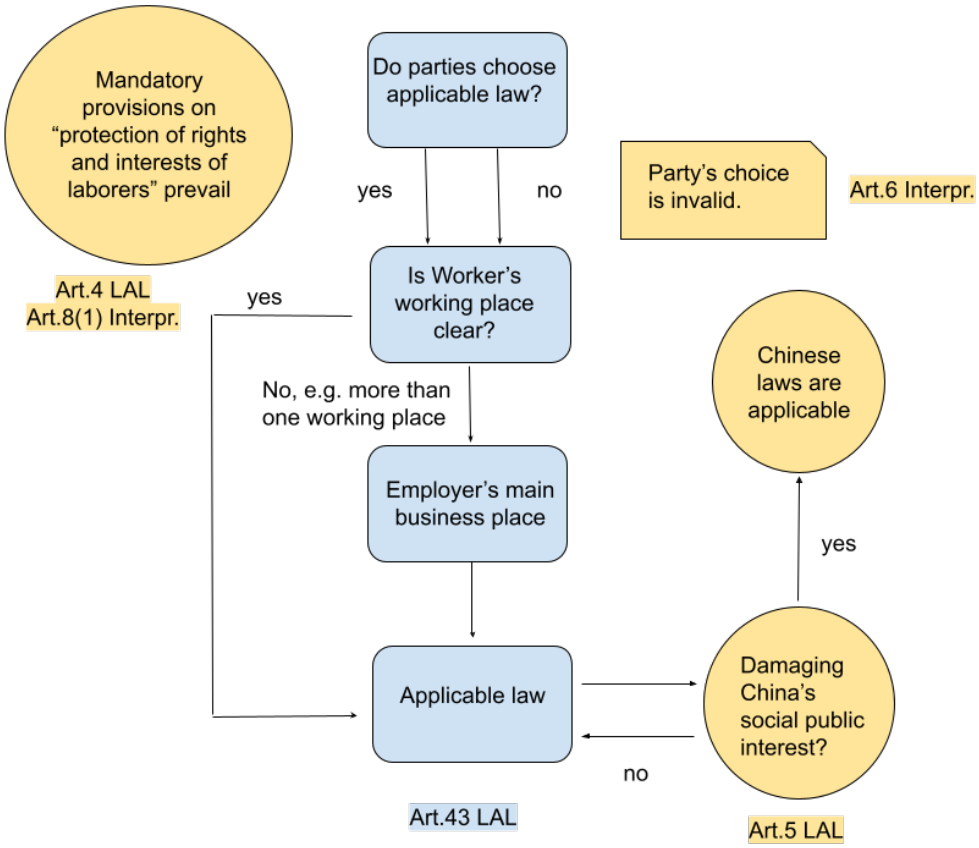
Compared to the previous similar rule in Art. 178 of GPCL Interpretation, the LAL Interpretation reasonably adds two conditions: adding "other organizations" into the subject range for parties; observing the parties' habitual residence. The changes meet the global environment needs as different types of organizations are appearing due to the academic division, e.g., unincorporated associations, which are between the purely natural and legal entities. Besides, incorporating the choice of law rules with parties' habitual residence reasonably reflects the principle of closest connection, as the place where the parties locate generally has a closer connection to the disputes.

To clarify more, Article 8 of LAL Interpretation lists the exampling circumstances that could be recognized as "mandatory provisions" mentioned in Article 4 of LAL: "matters relate to (1) the protection of the rights and interests of the laborers; (2) food or public health safety; (3) environmental safety; (4) foreign exchange control and other financial safety; (5) anti-monopoly and anti-dumping; and other circumstances." These matters relate to the social

[19] Interpretations of the Supreme People's Court on Several Issues Concerning Application of the Law of the People's Republic of China on Choice of Law for Foreign-Related Civil Relationships (I), which only deleted the previous Article 4 and 5 about the application of international convention and customs.

public interest, so the parties could not preclude the direct application of Chinese laws and regulations.

With the above rules, we could conclude the general choice of law rule to the transnational employment contracts. First, party autonomy is precluded. With Article 6 of LAL Interpretation, without the explicit provisions entitling the party's right to choose an applicable law, the choice of law between the parties is invalid. Second, the law at the worker's working place is the first applicable law. Third, with difficulties to decide the working place, the law of the employer's main business place shall be applied. Meanwhile, there are exceptions to the applied law: when damaging social public interest, Chinese laws prevail; Chinese mandatory provisions concerning to protection of rights and interests of the laborers always prevail. The rules could be concluded with the following graph.



However, questions come that how to understand the mandatory provisions "related to the protection of rights and interests of the laborers". If broadly interpreting, all the employment contract disputes will be directly governed by the Chinese domestic laws and Article 43 of

LAL would be unnecessary. If not, what is the boundary of "laborers' rights and interests"? Also, do the rules for an employment contract that precluding party autonomy conflict with the general rules for contracts, since LAL offers a possibility for parties to choose an applicable law by agreement based on Article 41 while precludes party autonomy for employment contracts. These issues are also noted by many scholars, which would be discussed further in detail in Chapter 3.

2.2.1 Special group I: labor dispatch workers

Article 43 of LAL especially lists out a type of worker: labor dispatching. According to the second sentence of Art.43, the laws at the dispatching place (some translated as "the place where the service placement is arranged") of labor services could also be applied to the labor dispatching related cases. The "labor dispatch" term used here cites the word used in the *PRC Labor Contract Law*,[20] of which Article 57 to 67 stipulate this special employment method.

Labor dispatch is a special employment form in China, which requires the involvement of two companies, one of which engages in the labor dispatch service business with the licensing qualification, i.e., worker dispatch service provider, and the other receives the dispatched workers and arranges specific work, i.e., accepting entity.[21] The service provider is the employer who signs labor contracts with the workers and bears the legal obligation as an employer, including paying salary, social insurance payment, etc. The service provider shall sign a dispatch agreement with the accepting entity. The accepting entity will arrange the routine work for the workers, provide labor safety protection and job training.

Article 43 provides another way to decide the applicable law, meaning that the law governing the cases of labor dispatching is not limited to the law of the employer's place of business, under the circumstance that worker's working place is not possible to determine. For example, theoretically, a Chinese worker dispatched by a Chinese labor dispatching service provider in the UK to work in Germany and France. Since there is not only one working place, with no matters related to the prevailing overriding mandatory provisions, the applicable law could be the Chinese law (the employer's place of business is in China) or

[20] PRC Labor Contract Law.
[21] Xie, Z. (2015). 79-80.

the law in the UK (the labor dispatching place is the UK). This rule reflects a deeper reason behind: in the dispatching employment contract, the relationship between the employer (labor service provider) and the worker is not the same as the ordinary employment relationship. The place where the worker is dispatched usually has a closer connection with the disputes arising,[22] as in most cases, the dispatching place is where the employee is recruited and therefore the local custom and transaction habit would be more suitable for the dispute resolution.

2.2.2 Special group II: foreign workers in China

As a large group involved in the transnational employment disputes, the foreign workers in China bring a continuous discussion, which is about whether the foreign worker's employment contract dispute case shall be governed by Chinese domestic law. This question is not clear until the issue of LAL, which defines the range of foreign-related dispute parties and decides that foreign workers' employment disputes with Chinese employers generally could be governed by Chinese laws since the worker's working place is China.

Besides, foreign workers in China are also subjected to the administrative rules, for example, *Interim Measures for the Participation in Social Insurance of Foreigners Employed in China, Regulations of the People's Republic of China on Administration of the Entry and Exit of Foreigners*, and *Provisions on the Employment of Foreigners in China*, which mainly stipulate the administrative management issues, including work permit and visa, residence permit, foreigner's social insurance, etc. What's more, Art. 25 of the latter also requires using the PRC Labor Law and the laws for labor mediation and arbitration to deal with the labor disputes between the foreign workers and Chinese employers. The same rules could also be found in the PRC Labor Law and PRC Labor Contract Law, which do not separate the Chinese and foreign workers and seem to include all the workers into the application range.[23]

[22] Huo, Z. (2011). 676.
[23] See Article 2 of PRC Labor Law: "This Law applies to enterprises, individually owned economic organizations and laborers who form a labor relationship with them within the boundary of the Peoples Republic of China."

The confusing situation in the laws and regulations brings difficulties not only in determining the choice of law rules for the foreign workers but also in the substantive legal issues. The detailed issues would be discussed further in Chapter 3.5.6.

2.2.3 Special group III: seamen

The applicable law for the labor dispute of a seaman is a complicated issue as the performance of a seaman's labor contract is related to many factors. The foreign factors are common in the seaman's labor disputes and due to the characteristic of seaman, the labor dispute will have a more complicated relationship with many different places, including the working place, the employer's main business place, the signing place, etc.

Before the establishment of LAL, the labor disputes of seamen in China are submitted to the maritime court, which are distinguished from the general labor disputes submitted to the labor tribunals. The labor disputes of seamen are also subjected to the *PRC Maritime Law*. The LAL has no clear mention about the seamen, except for Art.3 confirms the prevailing effectiveness of the Maritime Law when there are contradicted issues between LAL and the Maritime Law.

However, the Supreme Court issued the *Provisions on Several Issues Concerning Trial of Cases Involving Seaman-related Disputes* in 2020, which clarifies a series of disputes related to the seaman. Especially, this interpretation clarifies the choice of law rules for the transnational labor disputes of the seaman. In Art.17, the Supreme Court supports including a seaman in an employment contract into the applied scope of Art.43 of LAL, i.e., the seaman as an employee is also subjected to the choice of law rules as other general employees. However, when the seaman has a labor service contract with a vessel owner, instead of an employment contract, the Supreme Court supports the application of the law of the place where the seaman is dispatched, the vessel owner's main place of business, or the flag state, based on the claim by the party when there is no parties' choice. Besides, for the disputes arising from an intermediary or mandate agreement between a seaman and a seaman service provider, or between a seaman service provider and a vessel owner, the Supreme Court supports the application of the law of the place which has the closest connection to the contract based on the party's claim when there is no parties' choice. Here, "based on the claim by the party" means that application of the law of one country shall not be directly

introduced by the court. The choices shall be first claimed by the parties in the judicial process and then be decided by the court.

To make a short conclusion, the LAL provides the first uniform legislation concerning the choice of law rules, which for the first time especially list out the rules for the transnational employment contracts. However, the first try only provides one two-sentence-provision, which is not indeed mature and may cause practical issues. On the other hand, how is LAL implemented in the recent 10 years? In the next chapter, we will closely observe its implementation situation and problems in the judicial practice in China.

3. Empirical research and scholar concerns in China

Since the enforcement of LAL, the transnational employment disputes have a guiding rule in the choice of law. LAL solves the long-time confusing issues in deciding the applicable law caused by the lack of guiding rules. However, does LAL completely solve the problem or cause new issues? This chapter concludes the statistics from the official report and the online case databases and observes the cases from two empirical research in China after 2011, to show the real implement situation in China through statistic comparison and case analysis. Besides, the academic discussion about the issues and concerns by the Chinese scholars are provided.

3.1 The author's statistic research

3.1.1 Amount change of foreigners in China

According to the sixth population census of China in 2010, there are 593,832 foreigners have lived or planned to live in the mainland of China for over 3 months, among which 201,955 foreigners come to China for work.[24] The 2011 Report by the Ministry of Human Resources and Social Security of the PRC (MOHRSS) shows that there are nearly 241.9 thousand foreigners with work permits in China.[25]

After nearly 10 years, in 2018, it is reported that China has accumulatively issued 336 thousand foreigner work permits.[26] China is now doing the seventh population census since 2020, but the final statistics have not been published. However, we could see the amount changes from many local statistic research. For example, the number of foreigners who have residence in Shanghai has increased from 162,481 in 2010 to 172,076 in 2018.[27]

3.1.2 Amount change of Chinese overseas workers

According to the Annual Report issued by the Ministry of Commerce of the PRC (MOFCOM), in 2010, the number of all kinds of labor dispatched overseas worker was 411 thousand; the accumulated turnover of China's foreign labor service cooperation was US$73.6 billion with the total contract value of US$76 billion; the number of all the labor

[24] National Bureau of Statistics of China. (2011). *Tabulation on the 2010 Population Census of the People's Republic of China*. The number concerning to the "foreigners" in this chapter does not include the people from Hongkong, Macau and Taiwan.
[25] MOHRSS. (2012). *Statistics Report 2011*.
[26] China National Radio. (2021, February 15).
[27] Shanghai Bureau of Statistics. (2020). *Shanghai Statistical Yearbook of 2019.*

dispatched was 5.430 million.[28] After nearly 10 years, various kinds of workers dispatched abroad in 2019 amounted to 487 thousand and at the end of 2019, the number of the workers dispatched overseas reached 992 thousand.[29] These numbers decrease in 2020: the number of workers dispatched abroad was 301 thousand and at the end of 2020, the number of the workers dispatched overseas was 623 thousand.[30]

3.1.3 Number change of the transnational employment cases in China

Based on the Annual Work Report published by the PRC Supreme People's Court, in 2010, the Supreme People's Court received 13,318 cases and the local courts received 11.37 million cases in total, among which 11 thousand cases have foreign-related factors.[31] After 10 years, in 2020, the number of the total received cases by courts increases to 31.56 million, among which foreign-related cases are 17 thousand.[32]

The author searched cases on the Chinese online case website: China Judgements Online[33] on February 23, 2021, which is China's official website publishing the written judgments from all levels of the courts to push forward judicial openness. With the keywords of "labor and employment disputes" and "foreign-related", there are only 3 judicial documents found in 2011, 15 documents in 2013, and 103 documents in 2014. The amount of cases increases since 2014. In 2020, there are 347 judicial documents found, among which 135 documents are issued in the first trial.

Taking Shanghai as an example, the author searched from the above results by limiting the judging court place in "Shanghai". There are 30 judicial documents found in 2020, among which 10 cases are in the first trial; 40 judicial documents in 2019, among which 8 cases are in the first trial. The judicial documents for the foreign-related employment disputes only appear after 2016 in Shanghai. There are 13 documents found in 2016, 5 in 2017, 6 in 2018. In 2019, there are 40 judicial documents in total, of which 8 judgments are issued in the first

[28] PRC Ministry of Commerce. (2011). *Brief Statistics of China's Foreign Labor Service Cooperation in 2010*.
[29] PRC Ministry of Commerce. (2020). *Brief Statistics on China's Overseas Labor Service Cooperation in 2019.*
[30] PRC Ministry of Commerce. (2021). *Brief Statistics on China's Overseas Labor Service Cooperation in 2020*.
[31] Supreme People's Court of PRC. (2012). *Work Report by the Supreme People's Court of PRC in 2010.*
[32]Supreme People's Court of PRC. (2021). *Work Report by the Supreme People's Court of PRC in 2020.*
[33] The website's name is China Judgements Online, and the link address is https://wenshu.court.gov.cn/.

trial. There are 30 judicial documents found in 2020, of which 10 judgments are issued in the first trial.

However, the author searched the application of LAL in the transnational employment disputes with the keyword of "LAL", and only found 40 documents totally from 2014-2020 and there were no results before 2014. The number of cases implementing LAL in foreign-related employment disputes is 1 in 2014, 1 in 2015, 3 in 2016, 4 in 2017, 5 in 2018, 8 in 2019, and 18 in 2020.

3.2 Empirical research I: Yujun Guo, Jing Fan, the Application and Concerns of the LAL[34]

The research in 2013 focuses on the implementation of LAL since April 1, 2011. It is found by the research that the cases related to LAL from 2011 to 2013 mainly fall into the foreign-related contract disputes, which takes up 65.8% of the total amount of cases implementing LAL. Concerning the choice of law, the principle of party autonomy and the closest connection are frequently used in the field of contract and tort disputes.

However, there are many issues found by the research. One issue relevant to the employment contract dispute is the courts' wrongly applying the general rule for a contract to the employment contracts. One typical case, No. 26514 Case of 2010 in the Shanghai Pudong New Area District People's Court, is introduced: a Chinese worker with residence in the USA, signed an employment agreement with an American company, whose main business place is in the USA. The parties agreed that the applicable law is the law of Minnesota, USA. Soon, the parties were in disputes about the non-competition clause and filed the case to a Chinese court. When deciding the choice of law, the court supported that the applicable law was the law of Minnesota, USA, due to the party autonomy. However, the reason for applying the law of Minnesota, USA, in this case, should be that the worker's working place is Minnesota instead of respecting the party autonomy. Although the final applicable law was correctly the law of Minnesota State, the guiding rule used by the court was wrong.

Besides, many other practical issues are pointed out by the research, e.g., some courts misused the general principles in judgment even though there are specific rules for the

[34] Guo, Y. & Fan, J. (2013).

employment contracts; There is no citation of LAL in reasoning or the citation of LAL is inappropriate in the judgments, etc.

3.3 Empirical research II: Yuncheng Zhao, An Empirical Study on the Application of Law of Labor Contracts in Chinese Courts[35]

This research analyzes the Chinese case judgments published on the Chinese online case databases[36] from April 1, 2011, to Dec. 31, 2018. Totally 67 cases are found with the searching keyword "related to Article 43 of LAL". The research compares the cases and finds that among the 67 cases: 10 cases overlooked the foreign-related factors and directly applied the Chinese employment law, 18 cases made mistakes in classification, 11 cases wrongly cited the general principles in cases, 51 cases made mistakes in citing legislations in the reasoning part.

(1) Mistakes concerning the foreign-related factors

10 cases overlooked or wrongly decided the foreign-related factors, among which 6 cases did not discuss the foreign-related factors or the choice of law rules, but directly applied Chinese law even though the workers are foreigners; 3 cases overlooked the fact that working places are outside China and directly applied Chinese law; 1 case recognized itself as a foreign-related case wrongly because the legal presentative of the employer is a foreigner.

(2) Mistakes of citing general principles instead of specific provisions

Among the 11 cases, 2 cases decided the choice of law based on the closest connection principle, although it shall only be applied when there are no specific rules. In these two cases, it was clear to decide the worker's working place. 5 cases supported the party autonomy in choice of law to an employment contract, even though it is not acceptable in LAL. 4 cases misused the mandatory provisions: some cases used it to preclude the application of foreign laws because the judge believed that all the employment-related disputes are relevant to right and interest of laborers and shall be governed by the Chinese laws; some cases used the mandatory provisions and the rules for employment contract

[35] Zhao, Y. (2020).
[36] The research visited the link: http://www.lawyee.org, http://wenshu.court.gov.cn, and https://alphalawyer.cn on Dec 31, 2018.

simultaneously in deciding the choice of law. There is also one case wrongly using the choice of law rules for a general contract to employment contract issues.

Besides, there are mistakes in classification, including wrongly recognizing the tort case as employment disputes, and mistakes in provisions citing. There are 51 cases with mistakes in provision citing, among which 34 cases did not cite Article 43 in the judgment; 9 cases in the second trial overlooked the first trial's mistake of lacking citation of Article 43 in the judgments; 8 cases cited the legal base in a wrong sequence, i.e., not in the order that LAL, as a law, is before the Supreme Court's interpretation, and before discussing the substantive law issues. In addition, there are 26 cases relevant to seamen disputes wrongly deciding the choice of law.

3.4 Comparison and conclusion

With the above empirical research about the implementation of choice of law rules in China, we could conclude the following characteristics:

(1) The increase of transnational employment contract cases

The cases with disputes on transnational employment contracts increase since around 2014. After the establishment of LAL in 2010, the case did not increase immediately in 2011 as the law still needs time to be implemented and to draw attention to people. The increase of cases since 2014 reflects the increasing need for private international law as well as the increasing awareness by the judges and legal practitioners on the choice of law issues.

However, at the same time, the cases implementing the LAL are much less. If we compare the case amount of the disputes on the transnational employment contract and the implementation of LAL, we would find that, at least based on the author's research, there are 103 documents are relevant to dealing with the disputes on transnational employment contract, but only 1 of them implemented the LAL. Even in 2020, 347 judicial documents deal with the concerned disputes, while only 18 of them implemented the LAL. The reason could be, in some cases, the judges did not explicitly cite LAL and write them in the reasoning part, or, in some cases, the judges decided the applied law at will and overlooked the LAL. No matter which reason, these amounts show that there are still problems to be solved in implementing the LAL in China.

(2) The courts' lack of attention to the foreign-related factors

From Zhao's research, there are 10 cases among 67 cases, i.e., 14.94% of cases overlooking the foreign-related factors and missing the discussion on the choice of law in judgment. The Chinese domestic laws are directly applied. Meanwhile, LAL and relevant private international law rules are not cited appropriately in the judgments. Zhao's research shows that 51 cases among 67 cases, i.e., 76.12% cases made mistakes in citing laws and rules. It is a relatively high proportion and such mistakes even happen in the courts in some big cities, e.g., Beijing, Shanghai, Shenzhen, which are normally considered to hold a higher judging level in China.

These issues show the circumstance that the choice of law, or even the private international law, has not been paid enough attention to in the judicial practice. The judges lack the awareness to observe the foreign-related factors to decide the applicable law before going into the specific substantive law issues. Although Art.1 of LAL Interpretation defines the range of foreign-related factors, many judges are still holding the old understanding that only accepting the obvious foreign-related factors, e.g., foreign workers with residence outside China, Chinese workers working overseas for foreign companies, etc. The foreign-related factors of the other circumstances are often overlooked: e.g., foreign workers with residence in China, Chinese workers dispatched to work overseas for Chinese companies.

Moreover, even the final decision on the applicable law is correct, the process and reason of denoting the applicable law shall also be separately and explicitly written in the reasoning part of the judgment, no matter the final applicable law is Chinese law or foreign law. Otherwise, the judgment will be not complete in logic with a lack of a significant part, because choosing the applicable law is the unavoidable step before the substantive law discussion. Also, it is required that the sequence of citing legislation and rules shall be correctly following the hierarchy of law.

(3) Wrong understanding of the relationship between general principles and specific rules

The mistake of invoking the principle of party autonomy or closest connection in employment contracts, instead of citing Article 43 of LAL, reflects the judge's wrong understanding of the LAL's structure and design logic. Based on the LAL and its Interpretation, the closest connection principle shall be only applied if there are no specific

rules in the LAL or other laws (Art.2 LAL); The party autonomy written in Art.3 LAL is precluded for employment contract with Art.6 LAL Interpretation, as there are no explicit provisions offering party's right to choose the applicable law. Therefore, based on the existing law, there shall not be a discussion about the party autonomy in a foreign-related employment contract. On the other hand, unless the circumstance is so special, e.g., it is hard to decide the employer's main business place or the dispatching place of a dispatched worker, or any other circumstances that the existing rules are exhausted, may the closet connection be applied.

The misuse of general principles could be blamed partly on some judges' lack of knowledge, but the main reason is the short development of private international law in China. Due to the lack of a private international law code, before LAL, judges and legal practitioners don't have a uniform rule to guide their thinking in judging foreign-related cases. Also, judges tend to cite general rules and principles at their will because they simply feel that the general principles are more flexible in use. Over time, the bad habits in the application are formed, which would need more time to rectify. Also, people still need more time to study private international law and to think deeper about the law designing rules instead of the surficial provisions.

(4) Different understanding about the mandatory provisions

Some judges broadly apply the mandatory provisions in Art.4 LAL to all transnational employment contracts, because they recognize all the employment disputes as relevant to the "protection of worker's rights and interests", which shall fall into the range of mandatory provisions by Art.10 LAL Interpretation. How to define the range of "mandatory provisions" in an employment contract is a controversial issue rising much discussion among scholars. Due to the lack of a clear definition by law, there are different understandings, which leads to different opinions on citing Art.4 LAL in the transnational employment contracts. It's hard to say which understanding is correct, but the discrepancy of understanding causes different judgment results at different judging levels, which could be one issue to be solved.

To make a conclusion, the choice of law rule by LAL is still on the way to have a complete and reasonable implementation in judicial practice, with still many issues to be solved, including the judge's mistake of overlooking the foreign-related factors, wrongly misusing general principles in cases, different understanding on the mandatory provisions. The

reasons could be the different level of legal knowledge by the judges, the lack of enough awareness of private international law, the understanding discrepancy caused by some obscure legal terms, or the short development history of PIL in China.

3.5 Scholar criticism and concerns

In addition to the implementation issues, scholars bring discussion about the designing for the choice of law rule to foreign-related employment contracts. The concerns are provided taken into consideration of both the designing legal logic and the practical issues.

3.5.1 Obscure terms with controversial interpretation

The choice of law rule to the transnational employment contracts only takes up to one provision in LAL, i.e., Art.43. Since the two sentences tend to illustrate the rule in a simple way, some terms used in the provision lack distinct definitions and confuse understanding. First, the "working locality of laborers" does not make it clear that whether it refers to the place where the worker temporarily or habitually works. Guangjian Tu supports that this provision could only be understood as habitually working.[37] Guoping Sun and Lu Pu also hold the same opinion.[38] But they are all from the academic understanding, which has no legal effect.

Second, the rules in LAL directly cite the term "employment contract", with no distinguishment of the full-time employment contract, part-time employment contract, or substantial employment relationship.[39] The substantial employment relationship is one special situation defined in the PRC Labor Contract Law, where there are no valid written employment contracts but has formed a real employment relationship between the parties.

Although the rules could be easily interpreted to be applied to the above all kinds of employment contract, it will meet difficulty for the special groups. For example, the foreign workers in China with no effective work permit. Under such circumstances, although the parties have a superficial employment relationship, the employment contract is invalid because it violates the mandatory administrative requirement. Based on Art. 33 of the *Supreme Court's Interpretation (I) for Issues Concerning the Application of Law in the Trial*

[37] Tu, G. (2016). 102.
[38] E.g., Sun, G. (2015) and Pu, L. (2013).
[39] Xu, Q. (2017).

of Labor Dispute Cases, they are not recognized as having the employment contract. Then, the issue comes that what is the legal relationship of the parties. If they are considered as having a substantial employment relationship, it is still in the range of employment contract, so the disputes shall be governed based on Art.43 of LAL. If they are considered as having a labor service contract relationship, the case shall be governed by the choice of law rules to the general contract, i.e., respecting the party autonomy. Different interpretations will provide different rules of choice of law in cases.

Similar issues also happen to the Chinese overseas workers signing a service agreement with a non-licensed labor dispatch service provider, Chinese overseas workers signing service agreements with naturals, etc. Therefore, the simple term "employment contract" could not offer a distinct denotation in China, because "employment contract" in Chinese law has many special exception circumstances.

Finally, the object of the labor dispatching is not clear, which states "the law at the dispatching place of labor services shall apply to labor dispatches". There are two relationships in the labor dispatching scheme since there are three parties, including the labor relationship between the worker and the labor service provider, and the placement contract relationship between the labor service provider and the accepting unit. Therefore, it is criticized that the expression is not accurate, even though one can conclude that only the labor relationship falls under this provision as the placement contract relationship has no weaker party and need not special treatment.[40]

Therefore, with no specific legal definitions, the rules in LAL could only be used with academic interpretation through guessing the law intent and linking the term to the whole text. Although some interpretations have strong academic supports, from the lawmaking perspective, it is still necessary to clarify the terms through legislation and judicial interpretation.

[40] Huo, Z. (2011). 676.

3.5.2 Unclear applied scope: individual or collective contract?

Regarding the applied scope of the choice of law rules, there is no distinguishment of the individual employment contract and the collective agreement in the LAL provisions. Unlike the individual employment contract, a collective agreement is considered to provide some guideline for employment relationship between the group of employees and its application scope covers all the employees, including foreign workers and local workers.

Due to the special characteristic of the collective agreement, the effectiveness and the legal nature are controversial problems in different countries. For example, in the UK, the collective agreement is recognized as a general contract, which shall have no legal enforcement unless the parties expressly agree on its effectiveness.[41] Therefore, it is believed that the transnational dispute arising from the collective agreement shall be applied to the law with the same rule as the general contract, i.e., in the UK the collective agreement shall be applied to the law of the place with the closest and true connection to the contract.[42]

On the other hand, in most of the continent law countries, the collective agreement is put on the factor of "employment-related", which is recognized as necessary to introduce the government's administrative regulation and management. Therefore, the collective agreements in the civil law countries, e.g., in Germany, France, Finland, etc., have legal enforcement and shall only be prevailed by the individual employment contract when the latter affords higher benefits for the employees.[43] It is believed that the applicable law of the transnational disputes arising from the collective agreement shall preclude the party autonomy and shall be mainly dealt with by the law of the place where the employment contract is mainly performed.[44]

Therefore, the choice of law rules for the collective agreement are completely different from those for the individual employment contract. Although there is no clear exception mentioned in LAL, most of the scholars directly consider that the rules could only be applied to individual employment contracts.[45]

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[41] Section 179(1) of Trade Union and Labor Relations (Consolidation) Act 1992.
[42] *Monterosso Shipping Co., Ltd.* v. *ITF*.
[43] Sun, G. (2017).
[44] Krebber, S. (1999). 537.
[45] Sun, G. (2017).

3.5.3 Controversial understanding of mandatory provisions

As mentioned in Chapter 2, Art.4 LAL and Art.10 LAL Interpretation form a rule that the Chinese mandatory provisions about the protection of worker's rights and interests prevail in the choice of law in cases. Some scholars tend to incorporate all the employment relevant cases into the range that relevant to "protection of worker's rights and interests", therefore the foreign-related employment disputes shall always be governed by Chinese laws.

Reversely, the majority of scholars support prudent use of the mandatory provisions as they are in the range of "the directly applicable law", which shall be used under extremely strict circumstances.[46] For example, Qingkun Xu criticizes that the expression in Art.10 LAL Interpretation is too vague to understand. Using the directly applicable law at random may cause the specific rule on employment contracts unnecessary.[47] Renshan Liu proposes that it is significant to distinguish the effectiveness mandatory norms and administrative mandatory norms.[48] They are two types of mandatory provisions, while the former refers to those provisions when the violation would directly cause invalidity of the contract, the latter refers to those provisions when the violation would not certainly lead to invalidity and leave to the courts to determine its validity. Liu considers that the "mandatory provisions" in Art.4 LAL and Art.10 LAL shall only include the effectiveness mandatory norms. [49]

Luyu Guo advises to limit the range of mandatory provisions and offer a specific definition. Although Art. 10 LAL Interpretation lists some examples, they are too stiff to adapt to the judicial practice. For example, instead of abruptly incorporating all the matters into the range of protecting the worker's rights and interests, it is better to relatively narrow the range to the matters only involved with worker's significant substantive right. Some examples are suggested to be posed, e.g., matters relevant to social insurance, work safety, and production condition.[50] Similarly, Yuncheng Zhao advises that the mandatory provisions directly applied in employment contracts only include those involved with the labor standard, safety and sanitary, special groups protection, and social security.[51]

[46] Guo, L. (2016).
[47] Xu, Q. (2017).
[48] Liu, R. (2013).
[49] Ibid, 77.
[50] Guo, L. (2016).
[51] Zhao, Y. (2020).

3.5.4 Lack of party autonomy and the closest connection

Based on the LAL rules, the party's agreement on choice of law to the transnational employment contract is invalid. This rule precludes party autonomy in employment contract disputes. One reason for the design considers the weaker position of workers. Compared to employers, workers have weak power in negotiations, especially at the signing time of the labor contract, when workers usually tend to compromise much to get the job opportunity. If rejecting to the sign the agreement, workers may lose the job. To protect the worker from the unequal negotiation, party autonomy in the employment contract is precluded.

However, most criticisms on this issue have a common opinion that abruptly prohibiting party autonomy is too over.[52] Qingkun Xu criticizes it because it deprives of the parties' right to decide on the matters relevant to their right and obligations, overlooks the complexity of the employment and labor market, and hinders a good employer to deal with the labor relationship with workers in a flexible way.[53]

On the other side, the closest connection principle is considered not to be used commonly enough. LAL has two places reflecting the principle: Art.2 for matters with no specific provisions in LAL and other laws; Art.6 for choosing a region's law when the foreign country has different laws for different regions. These two provisions are only used under some special circumstances. It is advised to introduce the closest connection rule as a catch-all bottom provision, which permits using the law of the place with the closest connection to the disputes.[54]

3.5.5 Posted worker: an equal rule compared to other employees?

LAL lists the labor dispatching worker out as one special group and provides the judges another way to solve the problem: adding the law of the dispatching place as a choice. Some scholars admire this design and consider it as the reflection of LAL's exploitation of the principles of the closest connection and of protecting the weaker party. Xiangquan Qi believes that most of the foreign-related labor dispatching are under the circumstance that Chinese workers are dispatched by Chinese companies to work in other countries, so the dispatching place is the same as the place where parties signing contracts, which will meet

[52] Luo, F. (2018). 21.
[53] Xu, Q. (2017).
[54] Zeng, P. (2020). 74.

the requirement of the closest connection with the parties.[55] Jin Huang and Rujiao Jiang believe that the rule offers the judges more chance to choose a law that is more favorable to the worker if the law of the worker's working place or the employer's main business place has a lower protection level to the worker.[56] Mo Zhang also considers that the driving force behind Art. 43 is the motivation to provide better protection of the labor service provider rather than the receiving unit and sees this article as the reflection of protection to weak workers.[57] However, it is also criticized by some scholars that the rule broadens the judge's choosing range and leaves no united choosing standard for the judges, which would leave too much power to them.

On the other hand, posted workers could refer to many types of workers instead of only the labor dispatched workers, for example, workers in the foreign labor cooperation projects, and workers in employment relationship directly with foreign companies. LAL does not leave special rules for these groups.[58] Also, from the rule design, it is still not clear whether the dispatching place could be determined as the applicable law at the first step, or it could only work when the worker's working place is difficult to determine. Most of the scholars interpret the rule as the latter, but there is no clarification and confirmation by the Supreme Court.

3.5.6 Foreign workers in China: different cases understanding

As discussed before, the foreign workers in China are currently one group of objects which are mostly overlooked by the judges in determining the foreign-related factors of the cases. The situation is not only caused by the lack of knowledge or awareness of private international law, but also by the confusing and contradicted laws and interpretations about the foreign workers. These problems bring confusion for the judges to determine the application of LAL, and further impact the substantive rights and interest of the foreign workers in China.[59]

The first controversial problem is the legal nature of the relationship between foreign workers and Chinese companies while the performance of employment contracts violates

[55] Qi, X. (2011). 327-328.
[56] H, J. & J, R. (2011). 242.
[57] Zhang, M. (2011).
[58] Sun, G. (2013).
[59] Wu, W. (2013). 158.

China's administrative law. Based on the principle of private international law, before determining the applicable law of the case, it is significant to go through the classification process of the case first. The general rule is that the legal nature of the case shall be interpreted based on the law of the place where the court locates. In China's court, to determine the applicable law for a foreign-related individual employment contract, first, it is required to determine the case conflicts and the department law. However, based on the definition of "real employment relationship", a problem occurs in determining the legal nature and choice of law rules for a foreign-related case.

To take a common example, when a Chinese company illegal employs a foreign worker, e.g., the company did not apply for any work permit for the foreign worker or the foreign worker has no valid residence permit or work qualification, the signed "employment contract" will be recognized as invalid as the parties violate the mandatory administrative regulations. However, what is the legal nature of the relationship between the company and the foreign worker now? If they are considered as having a general contract relationship, the contract shall be dealt with according to the rules for a general contract, i.e., with Art.41 of LAL, respecting the party autonomy and the closest connection principle.[60] On the other hand, even though it is substantive invalid, the choice of law shall not deal with the substantive legal issues. One could say that it is still a dispute arising from the foreign-related employment contract, which shall still be dealt with according to Art.43 of LAL, the specific rules for the employment contract.

Therefore, the different understanding of the legal nature would lead to different application of choice of law rules, and consequently different applied law. Unfortunately, this question still lacks a uniform answer by the law or the interpretation by the Supreme Court.

The second question concerns the substantive right and interest for the foreign workers in China: whether the domestic employment law in China applied to the foreign workers. This problem is the practical question at a higher level following the first one. In the private international law process, after dealing with the choice of law, the next step is to apply the relevant domestic law in the chosen place. A controversial issue occurs in this stage that

[60] Ibid, 155-156.

different laws and interpretations have no uniform understanding that whether the PRC Labor Contract Law could be applied to foreign workers.

Based on the PRC Labor Contract Law, the applicable scope of this law does not distinguish the local or foreign workers. According to Art.2 of Labor Contract Law, the law is applied to all of the employees establishing the employment relationship with Chinese companies, organizations, etc., However, based on the *Provisions on the Administration of the Employment of Foreigners* in China, the law mentions that only some crucial issues, e.g., the minimum wage, right to rest, etc., shall be taken into account dealing with the employment contract issues with the foreign workers.[61] Besides, there are different requirements for foreign workers. For example, the term of employment contract could not exceed 5 years for foreign workers, while the local workers have no term limit and shall sign the permanent term at their third employment contract with the same employer.

These controversial problems also appear in the different local courts. Since there is no uniform interpretation, different courts give various answers to the question. For example, in Beijing, most of the courts support that foreign workers are also one type of employee in China, therefore shall be subjected to the PRC Labor Contract Law.[62] This idea leads to the result that the companies shall bear high responsibility in dealing with employment contract disputes with foreign workers. The termination, compensation, and other factors shall obey the law that the employer could not dismiss at random and shall give severance pay in special situations.

On the other hand, the courts in Shanghai have more open attitudes towards this question. Employment contract between foreign workers and companies in Shanghai respect the party autonomy,[63] that is to say, that the parties could terminate the employment contract at will, as long as it does not infringe the basic and crucial right and interest of the employees, e.g., the right to rest, the minimum wage, etc. This idea leaves more space for the parties, which increases the companies' flexibility in employment. No matter what attitude the court

[61] Art. 20&21 of the Provisions on the Administration of the Employment of Foreigners: Article 21 "Salaries paid by an employer to a foreigner it employs may not be lower than the local minimum wage standards"; Article 22: "Working hours, rests, holidays and leaves, labor safety and sanitation, and social insurance for foreigners employed in China shall be governed by the relevant provisions issued by the state."
[62] Huang, S. (2021, March 1*).*
[63] Zhou, G., Liang, H., & Cheng, X. (2016).

chooses, the situation is that cases will have different understanding and results in different courts, which would damage the certainty and predictability of the law.

In a word, the application of LAL in China still meets barriers and obstacles in many aspects. Although there are indeed historical reasons that the private international law has not developed in a long history in China, the lack of wise rule design and clear interpretation are also important reasons.

4. Choice of law to a transnational employment contract in the European Union

The regulations concerning the cross-border employment disputes in the European Union are involved with the private international law and internal market rules. Especially, to improve the predictability of the litigation outcome, the certainty of the applied law, and the free movement of judgments, the fulfillment of the internal market's goal requires the incorporation of private international law in the form of uniform rules, which designate the same national law no matter the case action is brought to which country.[64]

Three significant regulations in the EU constitute the basic legal structure of private international law in the EU: the Rome I Regulation,[65] Rome II Regulation,[66] and Brussels I Regulation.[67] The rules of choice of law about contractual obligation are enacted in Rome I Regulation, while the non-contractual obligations are stipulated in the Rome II Regulation. The choice of law rules to contractual obligations are previously enacted through the Rome Convention,[68] which was even though not a Community instrument for the former Article 293 EC Treaty, designed as a complementary instrument to EC law.[69] After steps of changes by the Amsterdam Treaty, Vienna Action Plan of 1998, and the Hague Program of 2004, Rome I Regulation finally replaced the Rome Convention as a Community instrument to be applied to the contracts signed as of 17 December 2009. [70]

From the perspective of the rule's content, Rome I Regulation refers to the rules to an employment contract in Art. 8, which gets inspiration from Art. 6 of the Rome Convention without large discrepancy. Although there are no new cases interpreting such provisions in Rome I Regulation, the cases concerning the Rome Convention are still valid and could be referred to in interpreting the Rome I Regulation.

Following the applied range as Art.6 of the Rome Convention, Art.8 of the Rome I Regulation is only applied to the individual employment contracts, that is to say, the rules in

[64] Recital 6 of Rome I Regulation.
[65] Regulation 593/2008 (Rome I).
[66] Regulation 864/2007 (Rome II).
[67] Regulation 44/2001(Brussel I Regulation), replaced by the Brussel I Regulation Recast as of 2012.
[68] 1980 Rome Convention on the law applicable to contractual obligations (80/934/EEC).
[69] Czerwiński, M. (2015). 148.
[70] Ibid, also refer to Art.24 &29 of Rome I Regulation.

the provisions are not suitable for deciding the choice of law to the collective agreements. In addition, there are also complimentary rules and principles in the other provisions, e.g., overriding mandatory provisions in Art.9, the concerns for public policy in Art.21, and the principle of protecting the weaker party in Recital 23.

This section will discuss the rules and principles about the choice of law to the employment contract in Rome I Regulation, with analyzing typical cases and providing practical concerns.

4.1 Freedom of choice and objectively applicable law

Art.8(1) of Rome I Regulation provides the parties' right to choose the applicable law through consensus. Following the principle of freedom of choice which locates in the uniform rule with Art.3, the parties of the individual employment contract are provided party autonomy. They could choose the applicable law either expressly, with a clear demonstration from the terms in the contract, or with a clear demonstration from the circumstances.[71] The chosen law could be agreed to apply to the whole or part of the employment contract.[72]

Most of the choices of law in an express way do not produce problems. Some problems would arise due to that choice of law is meaningless, the negative choice, or the parties have chosen non-state rules of law.[73] For example, in one English case *Shekar* v. *Satyam Computer Services Ltd.*, the parties agreed that "Governing law: The work permit in the UK/or any other European country shall be governed by, construed and enforced following the laws of the country you are placed at a and at Secunderabad, India." This clause's effectiveness was denied by the court because it is unclear that whether the clause regulates the governing law or the work permit, and the clause introduces multiple laws, which leads to the invalidity of the choice of law.[74]

On the other side, the tacit choice could also be the way while there are some limitations that it shall be clearly demonstrated by the terms of the contract or the circumstances of the case. What shall be also noted is that only the apparent existence of a tacit choice is permitted,

[71] Grušić, U. (2015). 141.
[72] Art.3(1) of Rome I Regulation.
[73] Grušić, U. (2015). 141.
[74] Ibid.

which is to say that the courts shall not refer to the law that would have been chosen by the parties if they had thought about it when concluding the contract.[75]

Besides, Art.8(1) places one restriction on party autonomy: the choice of law shall not deprive of the protection for the employee by the provisions that would be applied in the absence of choice and that "cannot be derogated from by agreement". It is also called the "objectively applicable law".[76] It means that the parties could not preclude the protection provisions to employees through a choice of law. During implementing this rule, it requires to first look at the applicable law following the rules in Art.8(2)-(4) with the hypothesis that there is no parties' choice of law. If there are provisions affording protection to employees, such provisions shall be the applicable law, no matter what kind of the applicable law is chosen by the parties. [77]

The restriction to the employment contract, which does not exist in the general contract, reflects the protection for the weaker party, i.e., employees, in the Rome I Regulation. While the uniform rule for contracts allows the parties to choose any third country's law as the applicable law, even though it has no connection to the contract, based on Recital 23 of Rome I Regulation, the weaker party shall be protected by rules more favorable to their interests than the general rules, which means that the minimum level of protection for employees is guaranteed. As such provisions are protection afforded to employees that cannot be derogated from by agreement under the law, it to some extent reduces the inequal issue brought by the parties' imbalance position in the negotiation and the contract conclusion.

One significant reason why many countries deny party autonomy in employment contracts is that the parties are not the "perfect parties" to the contract in employment. The employment contracts are signed at the beginning of the employment relationship. The employees at the time are eager to get the job opportunity and they may compromise too much in negotiation. Also, the employees are in the passive position with "to sign or leave". The average employees generally lack law knowledge and experience of negotiation compared to the employers. Therefore, purely leaving the parties to deal with all the disputes

[75] Giuliano, M., & Lagarde, P. (1980). 17.
[76] Van Hoek, A. A. (2014). 158.
[77] Yang, Y. (2014).

may damage the substantive rights and interests of the weaker party, i.e., the employees. Additionally, the restriction rule works for regulating the mobility of employment and preventing social dumping,[78] which is caused in the employment market by the different levels of employment protection, where the employer may tend to employ workers from the states where employees have lower protection to reduce costs.

The objectively applicable law here shall be distinguished from the "overriding mandatory provisions", as the latter is recognized in Art.9(3) of Rome I (will be discussed in details in chapter 4.3) to allow the courts to give the effect of the overriding mandatory provisions of the country of performance.[79] The objectively applicable law shall be interpreted narrowly to only concerning the relevant protection of employees.

4.2 Law in the absence of choice

Art. 8(2)-(4) of Rome I Regulation provides a scheme to decide the applicable law in the absence of a choice of law. From the literary meaning of the provisions, the applicable law for the employment contract with no party's choice will be the law of the country in which, or from which, the worker habitually carries out work in performing the contract ("Employee's habitual place of work"). When that place is difficult to determine, the employment contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated ("Employer's place of business"). Finally, when it appears from the circumstances as a whole that there is a country with a closer connection to the employment contract, the law of such place shall apply.

What shall be noted is that the linking factors used in the individual employment contract are different from those in the consumer contracts or insurance contracts, as the linking factors only include the employee's working place, the employer's place of business, etc., instead of the party's habitual place, which based on Art.19 of Rome I Regulation is the natural person's principal place of business or the companies' place of central administration.

[78] Van Hoek, A. A. (2014). 158.
[79] Grušić, U. (2015). 145.

4.2.1 Habitual place of work

Art.8(2) is the first level to decide the applicable law in absence of parties' choice. The term "in which… or from which the employee habitually carries out work in performance of the contract" used here is improved by the lights of the rules in the Rome Convention, of which Art.6(2) creates the similar rule that the law of the country "in which the employee habitually carries out his work in performance of the contract" shall apply; and the Brussel I Regulation on the jurisdiction place of individual contracts of employment, in which the courts for "the place where the employee habitually carries out his work" shall be sued to in addition to those of the employer's domicile place (the term changes in Art. 21 of Brussel I Regulation Recast[80] to "the place where or from where the employee habitually carries out his work").

We will discuss two specific questions here: how to determine the habitual place of work and what is the difference referred to with adding "from which" by the Rome I Regulation? First, to understand the concept of a habitual place of work, the case interpretation by the CJEU on the Rome Convention and Brussel I Regulation shall be introduced. Comparing the above three legislations, the texts of the relevant provisions are mostly identical, and they all pursue the purpose of protection for employees.[81] Also, the CJEU refers the case law on the old rules about jurisdiction in judgments to the new rules of both jurisdiction and choice of law. Therefore, the cases concerning "habitual place of work" in the Rome Convention, Brussel I Regulation, and even the old Brussels Convention[82] are also effective in interpreting the term in Rome I Regulation.

The concept of "habitual place of work" concludes from many old case interpretations, which support that the provision is broadly constructed.[83] In *Rutten*,[84] the place "where any employee habitually carries out his work" is the place where the worker establishes the effective center of his or her working activities.[85] Also, to decide the place, it shall be taken into account the fact that the employee spends most of the working time where he or she has an office to organize work and return to after each business trip abroad.[86] In *Weber*,[87] when

[80] Regulation 1215/2012 (Brussel I Regulation Recast).
[81] Van Hoek, A. A. (2014). 159.
[82] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.
[83] Czerwiński, M. (2015). 155.
[84] *Rutten* v. *Cross Medical Ltd* [1997] ECR I-57, Case C-383/95.
[85] Ibid, para. 23.
[86] Ibid, para. 25-27; also see para. 44 of *Weber*.
[87] *Herbert Weber* v. *Universal Ogden Services Ltd.* [2002] ECR I-2013; [2002] QB 1189, Case C-37/00.

the employee has no offices or the performance of employment contract is involved with several contracting states, the habitual place of work shall be the place where or from which the employee actually performs the essential part of his duties. This interpretation is provided based on the purpose of offering a jurisdiction place that has the most significant link to the dispute, affording the proper protection, and avoiding the multiplication of courts having jurisdiction.[88]

Especially, to decide the "essential part" in *Weber*, the Court provides further rules when the employee performs the same activities in more than one contracting state under a contract of employment, it is necessary to consider the whole of the duration of the employment relationship to identify the place where the employee habitually works. With failing in other criteria, the place where the employee has worked the longest is the habitual place of work where it has the essential part. [89]

The rule reflects the Court's emphasis on the actual performance of the contract because such a habitual place of work is where the employee performs his economic and social duties. Therefore, the law of such a place could relatively be closer to the conflicts and deal with the disputes affected by the business and political environment.[90]

The second question talks about the creative rule by Art.8(2) of the Rome I Regulation, which adds "from which the employee habitually carries out work" into the rule. It incorporates the case interpretation on Art.6(2) of the Rome Convention through the case *Koelzsch*[91]. Mr. Koelzsch is an international driver, domiciled in Germany, working for a Danish company where he transports goods from Denmark to other European countries, most of which are transported to Germany. The question submitted to the CJEU for a preliminary ruling is about the interpretation of "habitual place of work": when the employee works in more than one country but returns systematically to one of them, shall that country be regarded as the habitual place of work?

[88] *Weber*, para. 49.
[89] *Weber*, para. 58.
[90] Czerwiński, M. (2015) 156; *Koelzsch*, para. 42.
[91] *Heiko Koelzsch* v. *État du Grand Duchy of Luxemburg* [2011] ECR I-1595, Case C-29/10.

In the answer, the Court first stresses the hierarchy between the habitual place of work and the employer's engaging place of business. The Court emphasizes the necessity of taking due account of the need to ensure adequate protection to the employee since they are the weaker party in the employment contract.[92] In analyzing the provisions of Article 6(2)(a) and (b), the Court respects the idea that the provisions shall guarantee the applicability of the law of the state in which the employee carries out working activities rather than that of the state in which the employer is established.[93] Therefore, the habitual place of work shall be given a broad interpretation and the employer's place of business shall only be applied when it is impossible to determine the habitual place of work.[94] Therefore, in *Koelzsch*, the Court supports that Art.6(2)(a) shall be applied first since the employee carries out activities in more than one place, to determine the place which has a significant connection to the dispute.

Second, the Court offers a rule to determine the applicable law for the international transport sector. Based on the case law, e.g., in *Rutten* and *Mulox IBC*[95], when work is carried out in more than one country, the habitual place of work shall be the place from where the employee mainly carries out obligations towards the employer,[96] or in which the employee has established the effective center of working activities;[97] or, with the absence of an office, in which the employee carries out the majority of work.[98] Under the situation of international transport, all the factors which characterize the activity of the employee shall be taken into account.[99] In *Mulox IBC*, the CJEU interpreted the place of performance of the obligation "characterizing the contract of employment" under Art.5(1) of the Brussels Convention as the place where or from which the employee principally discharges his obligations towards the employer.[100] In particular, the Court in *Koelzsch* requires to verify the place where the employee did the transport tasks, got instructions about the tasks and organized his or her work, and the place where the work tools are situated. Additionally, the place where the

[92] *Koelzsch*, para. 41; *Rutten*, para. 22; Giulia Pugliese v. Finmeccanica SpA, Betriebsteil Alenia Aerospazio [2003] ECR I-3573, [2004] All ER (EC) 154, Case C-437/00, para. 18.
[93] *Koelzsch*, para. 42.
[94] *Koelzsch*, para. 43.
[95] *Mulox IBC Ltd.* v. *Hendrick Geels* [1993] ECR I-4075; [1993] ILPr 668, Case C-125/92.
[96] *Mulox IBC*, para. 21-23.
[97] *Rutten*, para. 23.
[98] *Weber*, para. 42.
[99] *Koelzsch*, para. 48.
[100] *Weber*, para. 43; *Mulox IBC*, para. 25-26.

transport is principally carried out, where the goods are unloaded and where the employee returns after completing the tasks are all important factors that need clarification.[101]

Besides, in the second sentence of Art.8(2), the habitual place of work precludes the circumstance that the employee is temporarily employed in another country. The Recital 36 of Rome I Regulation provides a supplementary definition on this provision. The "temporarily employed in another country" only refers to the circumstance that the employee is expected to resume working in the country of origin after carrying out tasks abroad. The new contract signed with the original employer or with an employer belonging to the same group as the original employer does not preclude the determination of "temporarily employed in another country". The second sentence creates a fiction of stability to guarantee the applicable law unchanged during a temporary posting.[102]

4.2.2 Employer's place of business

As mentioned above about the hierarchy, Art.8(3) offers the second scheme to decide the applicable law through the law of the country where the place of business through which the employee was engaged is situated, in the absence of party's choice when the habitual place of work could not be determined, which means that the place of business rule shall be applied narrowly.[103] The rule is the same as Art.6(2)(b) of the Rome Convention.

To understand this rule, Case *Voogsgeerd*[104] which interprets Art.6 of the Rome Convention shall be discussed. Mr. Voogesgeerd signed an employment contract with Navimer, a Luxembourg undertaking, at the headquarters of Naviglobe NV, a Belgian undertaking, and worked as a chief engineer on the ships. With employment disputes, Mr. Voogesgeerd claims to apply Belgian employment law as he carried out his work in Belgium where he received instructions and returned after the voyage.

The referring court referred the questions to CJEU for a preliminary ruling: (1) Shall the entity "through which the employee was engaged" in Art.6(2)(b) of the Rome Convention be interpreted based on employer concluded in the contract or the actual party connected to

[101] *Koelzsch*, para. 49.
[102] Czerwiński, M. (2015). 158.
[103] Ibid, 157.
[104] *Jan Voogsgeerd* v. *Navimer SA* [2011] ECR I-13275, Case C-384/10.

the employment? (2) Must the place where the employee regularly reports to and receives administrative instructions from be the place of actual employment? (3) Must the place of actual employment satisfy certain requirements, e.g., possession of legal personality, or only the existence of an actual place of business is enough? (4) What about the connected company?

In its answer, similar to *Koelzsch*, the Court first rejects the primacy of the traditional connection to the place of establishment of the employer.[105] The hierarchy of Art.6(2)(a) and (b) is emphasized also in *Voogesgeerd*. The Court also extends the rules that all the factors which characterize the activity of the employee shall be taken into account and especially determining the habitual place of work through the place where the employee carries out transport tasks, receives instructions concerning tasks and organizes work, and where the work tools are to be found, even to the issues relevant to the seaman in the *Voogesgeerd*.[106]

In answering the first two questions, the Court analyses the literary and law design intent of Art.6(2)(b). From the language, the word "engaged" only refers to the conclusion of the contract or the creation of a "De Facto Employment Relationship".[107] Also, based on the Advocate General in points 65 to 68, any deviation from the connection of conclusion will be inconsistent with the spirit and purpose of the provision.[108] Therefore, the place of business through which the employee was engaged must be interpreted exclusively to the place of business that engages the employment contract or employment relationship with the employer, i.e., related to the procedure for contract conclusion, instead of the place with a connection of actual performance. The relevant factors included the place of business which published recruitment notice, carried out recruitment interview, etc. [109] The restriction is also believed to avoid any manipulation by the employer since establishing an enterprise in another country only for contract conclusion would be too easy to be prohibited completely.[110]

Besides, since the factors mentioned in Question 2, including the place of instruction arrangement and employee report, are factors of characterizing the actual employment which

[105] Van Hoek, A. A. (2014). 160.
[106] *Voogesgeerd*, para. 38.
[107] *Voogesgeerd*, para. 46.
[108] *Voogesgeerd*, para. 45.
[109] *Voogesgeerd*, para. 50.
[110] Czerwiński, M. (2015). 157.

are related to determine the habitual place of work, they are not relevant to the place of business based on Art.6(2)(b).[111]

Question 3 discusses the formal requirements for the place of business. According to the Court, the term "place of business" does not certainly require a legal personality, but the undertaking shall have a degree of permanence. It means that every stable structure of an undertaking, for example, subsidiaries, branches, units, or offices of an undertaking could all be deemed as the place of interest. Also, it shall belong to the undertaking which engaged with the employee, i.e., formed an integral part of the structure. However, the purely transitory presence in another country of an agent of a company is rejected to be recognized as a "place of business".[112] Similarly, a place that merely acts as a mailbox is precluded.[113] On the contrary, a permanent establishment of the undertaking could be received.[114]

In Question 4, the Court notes that it is required to clarify the actual employer in the employment relationship. By citing the case *Eurofood*,[115] the Court made it clear that all the objective factors shall be taken into consideration to prove that there is indeed a real situation that the actual employer is another entity different from the party signing the employment contract.[116]

The case interpretation brought heated discussion in the European private international law. It is criticized that provision causes excessive uncertainty, does not fulfill the goals of employee protection, or hampers the foreseeability of the choice of law outcome.[117] Uglješa Grušić thinks the subsidiary rule is not necessary since most of the situations are covered in the application of "habitual place of work". Only in the rare cases, where the employee's work is not carried out from a permanent base, the distribution of working time spent in different places, and the parties are not in intensions to establish a habitual place of work; there are more than one permanent bases with equal importance in different countries, or the worker is working in Antarctica or on the high seas, the place of business rule will be

[111] *Voogesgeerd*, para. 44.
[112] *Voogesgeerd*, para. 55.
[113] Riesenhuber, K. (2012). 178.
[114] *Voogesgeerd*, para. 56.
[115] *Eurofood IFSC* [2006] ECR I-3813, Case C-341/04.
[116] *Voogesgeerd*, para. 62; *Eurofood*, para. 37.
[117] Grušić, U. (2013). 173.

applied.[118] Therefore, the necessity of the place of busines rule is suspected, or the *Voogsgeerd* case interpretation is regarded as unjustified as it conflicts with the principle of effective interpretation.[119]

Besides, it is also criticized that the term "place of business" in Art.8(3) shall be distinguished from the same term in Art.19, since the former denotes the undertaking or any structure of undertakings, while the latter is applied to a natural person.[120]

4.2.3 Escape clause: the closest connection

Art.8(4) of Rome I Regulation is the exception of the above rules in absence of party choice. When there is a country with which the contract is more connected based on the whole circumstances of the dispute, the law of such a country shall apply. This exception could only apply when there appears a place with a closer connection than the habitual place of work or the employer's place of interest, which acts as escaping from the general rules. However, this escape clause is agreed by the academic majority to be used extremely strictly. There are not many cases applying the escape clause until the CJEU interpreted specifically on the provision through the case *Schlecker*.[121]

In *Schlecker*, CJEU explains the relationship and position between the escape clause in Art.8(4) and the rules in Art.8(2) & (3). Ms. Boedeker is one employee in the Schlecker company, who ended the employment relationship in the Netherlands and was re-instated to work in Germany. With termination disputes, Ms. Boedeker claimed to apply Dutch law, which provides more protection to the employee in dispute; while Schlecker company claimed to apply German law, which has a closer connection to the dispute with the parties' nationality and place of domicile, the applied tax law, social security, and pension schemes are all related to Germany.

The Court explained in the judgment that the rules of the habitual place of work and the employer's place of interest are in the same foot meeting the escape clause, i.e., there is no hierarchy to determine the closest connection law.[122] Besides, Advocate General Wahl

[118] Ibid, 181.
[119] Ibid, 182.
[120] Czerwiński, M. (2015). 157.
[121] *Anton Schlecker* v. *Melitta Josefa Boedeker*, CJEU judgment, 12 September 2013, Case C-64/12.
[122] Van Hoek, A. A. (2014). 162.

provides more explanation on the relationship between Art.8(2)&(3) and Art.8(4). One view is that the application of possible closer connections could only occur when Art.8(2) or (3) is not possible to implement, i.e., Art.8(4) works as an exception when the presumptions result in a choice of law which is manifestly inappropriate to the contract.[123]A second view is that the court has the discretion to determine the closest connection, i.e., there is no hierarchy in determining. The second view is supported by the Advocate General due to consideration of the case law devolving from *Koelzsch* and *Voogsgeerd*.

Also, in *Schlecker*, CJEU claimed that there is no evidence that the law which is most favorable to the worker shall be automatically applied even though the objective of Art.6 of the Rome Convention is to guarantee adequate protection for the worker, which requires to apply the law of the country with which the contract has the closest connection.[124] Also, to determine the significant factors suggestive of a connection, the Court emphasizes some important factors: the place where the employee paid taxes for his or her income from work, the place where he or she is covered by a social security scheme and pension, sickness insurance, and invalidity schemes. Some relevant factors, e.g., relevant to salary, working condition, etc., shall also be considered.[125]

4.3 Correction mechanisms

Rome I Regulation offers two "correction mechanisms" for the applicable law: one of which is the overriding mandatory provisions, where the provisions by the forum state shall be applied at priority if they are relevant to the fundamental interest; [126] the second of which is the public policy exception in Art. 21, where the applicable law shall be refused when its application is manifestly incompatible with the public policy (or referred to as "ordre public") of the forum.

4.3.1 Overriding mandatory provisions

Art.9 of Rome I Regulation posts a concept of the "overriding mandatory provisions": those for which the respect is regarded as crucial by a country for safeguarding its public interests, such as its political, social, or economic organization, to such an extent that they are

[123] *Schlecker*, AG Opinion, 16 April 2013, nyr, Case C-64/12.
[124] *Schlecker*, para. 33-34.
[125] *Schlecker*, para. 41.
[126] Bochove, L. M. V. (2014). 147.

applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under the Regulation.[127] To verify its application, the next two sentences of Art.9 provide interpretation from two perspectives. On the one side, the application of the overriding mandatory provisions of the law of the forum shall not be restricted by any other provision in the Rome I Regulation. On the other side, when the overriding mandatory provision of the law of the country where the employment contract's obligations have to be or have been performed renders the performance of the employment contract unlawful, the effect will be given to the overriding mandatory provisions with consideration of their nature, purpose, and the consequences of the application or non-application.

The rule of overriding mandatory provisions is based on the predecessor of Rome I Regulation: Rome Convention. In addition, the definition of "overriding mandatory provisions" in Art.9(1) of the Rome I Regulation is originated from the interpretation on Art.7 of the Rome Convention through the case *Arblande*,[128] in which CJEU distinguishes them from the "ordinary" mandatory provisions because they could not be circumvented by party's choice. On the other hand, they are also different from the "objectively applicable law" in Art.8(1) because they are directly applied in priority. To understand the overriding mandatory provisions more, CJEU gives more limitations through the case *Unamar*,[129]in which the application of overriding mandatory provisions is required to be in conformity with the rules on free movement in the internal market.

Comparing the Rome I Regulation and Rome Convention, one difference appears regarding the range of "foreign mandatory laws". One may say that the scope of the rule in the Rome I Regulation has been considerably restricted.[130] In the Rome Convention, the effect may be given to the mandatory rules of the law of "another country" with which the situation has a close connection, while the Rome I Regulation limits to only those of "the country where the obligations arising out of the contract have to be or have been performed". The idea to

[127] Art.9(1) of Rome I Regulation.
[128] *Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL (C-369/96) and Bernard Leloup, Serge Leloup and Sofrage SARL (C-376/96)* [1999] ECR I-8453; [2001] ICR 434, Joined Cases C-369/96 and C-376/96.
[129] *United Antwerp Maritime Agencies (Unamar) NV* v. *Navigation Maritime Bulgare*, CJEU judgment, 17 October 2013; AG Opinion, 15 May 2013; nyr, Case C-184/12.
[130] Rammeloo, S. (2017). 313.

restrict the application of overriding mandatory provisions other than those of the law of the forum could also be found in the drafting history of the Rome I Regulation.[131]

To understand the provisions deeply, we will discuss some significant terms selected from the provisions separately.

(1) The overriding mandatory provisions and public interest

The overriding mandatory provisions in Art.9 prevails to any other rules, which shall be distinguished from the restriction provision in Art.8(1) with the protection afforded to the worker that cannot be derogated from by agreement. The latter offers mandatory contractual protection to the worker with a weaker position, which works totally depending on the choice of law rules, while the overriding mandatory provisions usually have a public character and an independent international scope of application in an exclusive manner.[132] It is stated by the Opinion of Advocate General Szpunar in the case *Nikiforidis* that the overriding mandatory provisions are "catalogue of a priori privileged provisions cannot be created" because their application scope does not arise from the wording but the court through particular cases on a case-by-case basis.[133]

Based on Art.9(1), the overriding mandatory provisions are those which are "crucial by a state for safeguarding its public interests". In scholar's discussion, the provisions falling into the range of public interests are believed to include the provisions enforced in the criminal law field, enforced by a public agency, regulating economic or social policy, protecting institutions, etc., [134] or which mention the state's political, social, or economic organization.[135] To understand it broadly, the norms are also recognized that are related to protecting the export bans, foreign exchange, market ad competition, or those in protection for sick pay, female workers, lay off, etc.[136]

(2) The source of overriding mandatory provisions

[131] *Greek Republic* v. *Grigorios Nikiforidis*, EU:C:2016:774, Case C-135/15, para. 45. The case will be discussed in detail in the following section.
[132] Van Hoek, A. A. (2014). 166.
[133] *Nikiforidis*, Opinion of Advocate General Szpunar, para. 72-73.
[134] Czerwiński, M. (2015). 158.
[135] Bochove, L. M. V. (2014). 148.
[136] Czerwiński, M. (2015). 159.

According to Art.9(2) and (3), the overriding mandatory provisions could come from the law of the forum (*lex fori*); or the law of the country where the employment contract's obligations have to be or have been performed. However, some questions are remained to answer. First, what is the relationship and hierarchy between the overriding mandatory laws of the *lex fori* in Art.9(2) and rules in Art.9(3), i.e., when the employment contract is confronted with overriding mandatory laws from more than one country, which one shall be applied? Second, how to interpret and decide the bounder of "the country where the employment contract's obligations have to be or have been performed"? Must it be interpreted as a worker's working place or employer's main place of interest? Third, could the overriding mandatory laws from another country rather than the above be applied based on Art.9(3) of the Rome I Regulation?

There are no specific interpretations on the first two questions, while the third question could be answered through discussing the case *Nikiforidis*, which is the first case where CJEU explained Art.9(3) of the Rome I Regulation. Grigorios Nikiforidis worked in a primary school run by the Greek Republic in Nuremberg. Due to implementing the Greek legislations, Nikiforidis' remuneration was reduced based on the agreements concluded between the Greek Republic and the European Commission, the European Central Bank, and the International Monetary Fund.

During the judicial process of the employment disputes, the referring court submits questions to the CJEU for a preliminary ruling on Art.9 of Rome I Regulation. Except for the first question about the application relationship between Rome Convention and Rome I Regulation, The CJEU concluded the rest two questions as follow: a. whether the Art.9(3) of the Rome I Regulation must be interpreted as precluding overriding mandatory provisions other than those of the State of the forum or the State where the obligations arising out of the contract have to be or have been performed from being taken into account, directly or indirectly, by the court of the forum according to the national law applicable to the contract, and; b. what requirements might arise from the principle of sincere cooperation, enshrined in Art.4(3) TEU, concerning the direct or indirect taking into account of those other overriding mandatory provisions by the court of the forum.[137]

[137] *Nikiforidis*, para. 40.

The CJEU did not provide a long and detailed explanation for these two questions as answering the application range in the first question. Citing the case *Unamar*, the Court states that the application of Art.9 shall be under exceptional circumstances, which shall be interpreted in a strict manner.[138] Otherwise, it will hamper the full achievement of the general objective of the regulation stated in Recital 16, i.e., legal certainty, affect the foreseeability of the applicable law, and jeopardize the choice-of-law rules in Article 8.[139] Therefore, the Court interpreted the list in Art.9(3) as exhaustive and precluded the application of the overriding mandatory provisions other than those of the forum or of those where the obligations arising out of the contract have to be or have been performed. However, the Court does not prevent from taking such into account as matters of fact, in so far as this is provided for by the national law that is applicable to the contract according to the regulation, as Rome I Regulation only harmonizes the choice-of-law rules instead of the substantive rules.[140] For the second question, the Court denied the conflicts between the rules and the sincere cooperation principle laid down in At.4(3) TEU.[141]

4.3.2 Public policy exception

To negate the foreign law, which is manifestly incompatible with the fundamental principles of the forum state,[142] the Rome I Regulation introduces the public policy exception in Art.21, which reflects the consideration for morality and fundamental value. However, with the previously mentioned restriction rules, e.g., the protection for the worker in party autonomy in Art.8(1) and the overriding mandatory provisions in Art.9, there are rare cases in which the public policy exception is used.

4.4 Posted Workers Directive (PWD)

The PWD is considered as one overriding mandatory provision that shall prevail to other rules in the Rome I Regulation regarding regulating the workers posted to other member states. It was originated in 1996 as the Directive 96/71/EC[143] and amended in 2018 as the

[138] *Nikiforidis*, para. 44.
[139] *Nikiforidis*, para. 46-48.
[140] *Nikiforidis*, para. 51-52.
[141] *Nikiforidis*, para. 54.
[142] De Boer, T. M. (2008). 296.
[143] Directive 1996/71.

Directive (EU) 2018/957[144]. Besides, there is a Directive 2014/67/EU[145] on the enforcement of the PWD.

The establishment of the PWD is originated to balance the interests between the low-cost sending states (sometimes even the interests of the posted workers) and the high-cost host state companies and other workers.[146] With the limited definition on the "posted worker" in Article 2(1) that posted worker is a worker who, or a limited period, carries out his work in the territory of a Member State other than the State in which he normally works,[147] and the goal to encourage the market freedom, the protection to the posted worker is based on a transitional regime, i.e., the posted worker shall be protected by the employer's home state instead of the host state.

It is believed that the posted workers are different from the migrant workers and the former are not deemed to enter the labor market of the host state.[148] Under that circumstance, the unequal protection between the local workers and the posted workers would lead to "social dumping": the profit-chasing companies would tend to employ workers from the place with lower labor protection, where the workers may lack enough protection to guarantee, such as the basic security insurance, full rest, reasonable pay, collective negotiation, etc. On the other hand, purely applying the host state laws to the posted workers will also put them into a passive position to follow double standards from both the host state and the sending state.[149] Besides, considering the economic cost, i.e., compensation for a work-related injury, social relief to the unemployed persons, etc., it may add a higher cost burden for the host state. [150] Therefore, providing a uniform standard particularly to the posted workers is significant.

Article 3 of the old version in 1996 ensures the minimum protection level for the posted workers to balance its protection to those for the local workers. Some necessary items, e.g., minimum rest period, minimum rates of pay, health and safety, protective measures for the pregnant women, etc., are listed in this provision. It is supported by some scholars that this

[144] Directive 2018/957.
[145] Directive 2014/67.
[146] Fornasier, M., & Torga, M. (2013).
[147] Art.2(1) of 1996 PWD.
[148] Van Hoek, A. A. (2014). 166.
[149] Ibid, 167.
[150] Yang, Y. (2014). 322.

provision is a private international law provision which provide examples of the "overriding mandatory provisions" in Art.9 of the Rome I Regulation.[151]

In the new amendment in 2018, the posting period is required to be less than 12 months, with a possible extension of another 6 months.[152] The posting period exceeding 12 months would lead to the direct application of the host law to the employment regulation.[153] Also, the protection level in remuneration pay is increased, as the previous directive only requires the remuneration to a posted worker higher than the minimum wage of the host country, while the new directive requires that the remuneration shall follow the rules in the host country.[154] Besides, the accommodation, allowance, and reimbursement shall also obey the rules in the host country.[155]

It is concerned by someone that such higher protection would lead to a higher obligation to the employer, for example, the employer shall pay more to the posted workers as the requirement increases from the minimum level.[156] Also, it may lead to more problems in employment management. However, the goal is to provide more practical protection to the posted workers and to promote the freedom and equality of the internal market of the EU.

4.5 Protection of weaker party

The principle of protecting the weaker party is significant in private international law. Concerning the different positions in the contract, unequal and untransparent information, and the discrepancy in negotiation power, the weaker party shall get support and extra help from the law. The rules with regards to the employment contract and consumer contract are two typical examples for the protection of the weaker party.

The protection principle is listed in the general provision chapter, where Recital 23 stipulates that the weaker party shall be protected by conflict-of-law rules that are more favorable to their interests than the general rules. This principle for the employee is shown in many

[151] Van Hoek, A. A. (2014). 167.
[152] Para. 1(a), Art.3 of Directive 2018/957.
[153] Ibid, Recital (9).
[154] Ibid, para.1 of Art.3.
[155] Ibid.
[156] KPMG. (2021, March 25). *Podcast Transcript on the Revised Posted Workers Directive and its Impact on Global Mobility*.

aspects of the rule design. First, as discussed before, the rules in Article 8 provide different methods for employment contracts compared to the general contracts. Second, the rules allow the party autonomy with objectively applicable law limitations, which follow the general rules for the contract and respect the flexibility of employment, as well as narrowing down the free choice of law.[157] Third, the application of the overriding mandatory provisions is also one form of protection for the employees, as they are mostly mandatory provisions providing obligations for the employers and listing out the minimum protection level for the employees, e.g., the administrative requirement for labor safety, the collective agreements, etc.

The choice of law rules to the transnational employment contract in the EU harmonizes the legislation rules stipulated in the Rome I Regulation and the legal practice summarized in the CJEU cases. The special advantages of the rules in the EU are mainly reflected by the rule logic and the improving reasonable and legitimate deciding ways for the choice of law.

[157] Bochove, L. M. V. (2014). 152.

5. The reflection in China

With the previous four chapters, we look at the choice of law rules in the transnational employment contracts separately in China and EU from an overview angle. It is surprising to find that there are some similarities between them, e.g., the general principles of protecting the weaker party and the public policy concern. However, some different attitudes towards certain rules lead to the different legal circumstances in the two systems. Meanwhile, we had a general view on the rule's implementation circumstance in China in Chapter 3, which shows that it remains some space for China to polish its rules design of the choice of law.

This chapter will observe the difference between the choice of law rules in a transnational employment contract in China and the EU and propose some potential improvements for China's choice of law. Some of the suggestions are analyzed from the perspective of feasibility. Besides, some other concerns about China's choice of law will be discussed, e.g., the link between the PRC Civil Code and the PIL in China, the influence by the OBOR and overseas investment, the impact of the pandemic since 2019, etc.

5.1 New reflection from EUPIL

Make a general comparison between the choice of law rule in a transnational employment contract in the EU and China: The rules in the EU follow a strong logic, which consists of two main different schemes. The first road leads to the party's choice: respecting party autonomy, with the reasonable prohibition of derogation from protection provisions. The second road, in the absence of the party's choice, follows the steps of the worker's habitual place of work – the employer's place of business, while the closest connection principle works as an escape clause. The overriding mandatory provisions and public policy concern work as exceptions to the above roads, which require the mandatory application. The general principles work as a guiding spirit that could help in interpreting other provisions.

On the other side, the rules in China (mainly Art.43 of LAL) only follow one road: worker's working place – employer's main business place, as there is no permission on party's autonomy. The mandatory provisions and public policy concerns also work as exceptions, but with different definitions and legal effects. The general principles, e.g., protecting the weaker party and the closest connection, have their place in the law but no effective value.

Therefore, with the above separate analysis and the comparison of the rules in EU and China, we conclude and propose the following good experience that may be learned by China.

5.1.1 Introducing the party autonomy and objectively applicable law

As mentioned before in Chapter 4, the rules in the EU permit the party autonomy and list out simultaneously the limitation that provisions affording protection to the employee could not be derogated. The design to some extent reduces the inequality problem between the employer and the worker in party autonomy, and at the same time preserves the flexibility of employment management, as most employers are "good employers" and look for an effective solution with enough consultation with workers.

If we go deeper into the legal nature and value behind party autonomy, we could find its close connection to the legal nature of employment and labor law. Because in addition to the concern that party autonomy may be wrongly utilized by the "bad employer", there is a relevant old question that shall employment and labor law be classified as a kind of special contract law or as a law with administrative features. The understanding of this question plays a great role in understanding and accepting the party's free choice of law in the transnational employment contract.

Unfortunately, it is sad to say that based on the historical background and academic attitudes in China, employment and labor law has been added more and more administrative characteristics in recent years. The trend is to seek a more unified and stricter regulation on the employment relationship, which could solve the judicial discrepancy in different areas. Although the original intention is beneficial to the employment law development, it leads to the result that employers are losing management flexibility and bearing heavier obligations.

This trend that the parties are losing flexibility in contracting is also shown in the attitudes towards the foreign workers in China. As mentioned before, there are two different understanding about foreign workers' rights and obligation, e.g., could the parties agree on the termination conditions different from the PRC Labor Law in the employment contract; or could the parties agree on the liquidated damages which are not mentioned in the PRC Labor Contract Law. Two big cities in China, i.e., Beijing and Shanghai, hold different attitudes: Shanghai supports party autonomy while Beijing requires the parties to strictly obey the law. Actually, in the legal practice, there are only Shanghai respecting the party's

choice, while other areas all follow Beijing's attitudes to limit the parties into the provisions of PRC Labor Contract Law.

With such background, it is frustrated to say that although providing party's free choice is beneficial and the objectively applicable provisions could to some extent avoid the problems caused by unequal positions, it seems for the time being to be less likely to be introduced in China. However, if introduced in China on some other day, it shall be noted that the objectively applicable provision here has a separate definition different from the general mandatory provisions. As here the protection provisions which afford protection to employees and which could not be derogated are different from the overriding mandatory provisions, if introduced in China, it shall be distinguished from the Chinese mandatory provisions in Art.4 LAL that are applied in priority, and it would be better to clarify these two definitions and their different scopes.

5.1.2 Clarifying definitions in the provisions

As discussed in Chapter 2, China's rule is only reflected in one provision (Art.43) with only 2 sentences. Since there is no clear interpretation of the definitions, understanding in various courts would be different and the judging results would be different. It will damage the legal certainty and the predictability of judgment. Besides, it would be vulnerable to different levels of judgment competency.

Some key conceptions shall be interpreted prudently. For example, in the first road of "the worker's working place", many questions need to answer with a clearer rule. Shall the working place be the worker's residence place, or it could also be a permanent working place? If the former, how to understand the "residence" place, e.g., shall the worker live there over three months or six months? What's the definition of work, shall it be full-time work, or it could be just a part-time job? What if the worker has various working places or the worker does not have a fixed working place? For example, an international transportation driver may spend most of the working time on the journey from country A to country B or may travel to different countries depending on the different task needs.

One would say these circumstances meet the condition that "the worker's working place is not sure" and could refer to the next step: the employer's main business place. It seems to solve the specific problem we are confronted with. However, it leaves a bigger problem:

most of the cases will be dealt with by the law of the place where the employer is located, where the first step of "the worker's working place" loses its practical value. Accordingly, the employer would hold more power in the employment relationship and stand in a higher position. The relationship between the employer and employee would become more unequal. Therefore, designing a rule with high technical skills and ensuring its practical value are both important.

The second road of "the employer's business place" also has the problem of lacking deeper interpretation. For the circumstance that the actual managing employer is not the one signing the employment contract, or that the employer has more than one business place with difficulty to determine the "main" one, problems would rise as the vague expression in Art.43 of LAL could not give the final answer.

Therefore, it is suggested to supplement the interpretation of such keywords. Some excellent points used by the EUPIL could provide experience for China to learn. First, it is wise to add the "habitual" factor to preclude the permanent posting circumstances in determining the worker's working place; Second, the principle that the main habitual place of work is the place where the worker performs the "essential part" of work shall be noted. No matter to determine the place through the standard that where the worker mainly carries out the obligation, where the effective center is established, or where to carry out the majority of work, they all reflect the principle of the closer connection to the contract; Third, EU prefers to stick on the surficial "employer" signing the contract instead of the actual managing company when determining the "employer". Although it is a controversial issue and China may have different concerns and judgments in interpretation, CJEU's interpretation on the requirement that the undertaking shall to some extent have a degree of permanence could be referred to. Although there could be no specific strict requirement, e.g., as a legal entity, a mailbox or an empty location with only the surficial information address is not acceptable, as it violates the original intent to apply the law with the close connection to the party.

From the perspective of feasibility, such alterations are easy and necessary to make. On the one hand, the two sentences in Art.43 of LAL could not comprehensively cover all the conditions. On the other hand, the terms are too vague to be directly used in cases. To supplement the meaning of terms and improve the rule design through accumulating feedback from the cases and making amendments is a good way to choose.

5.1.3 Providing practical use of the closer connection principle in the employment contract

Even though the closer connection is one principle stipulated in China's law, it has no practical value, i.e., the principle has no place to use for an employment contract. EU also lists it as a general principle in the Rome I Regulation. However, to be different, the closest connection principle is also put into application in the employment contract in the EU, as a third road. Although it is also criticized that this third road has not much practical implementation in the EU so far, it still leaves a road to deviate from the general rule and to find the law with a closer connection directly.

With observing the rules design and implementation in China, however, it is not recommended to directly add the principle into the specific rule (i.e., Art. 43 of LAL). For the judges in the courts, using the closest connection principle appropriately is a tough task, which requires full knowledge and experience in private international law. However, based on the judicial situation in China, many judges still need time to enhance their knowledge and skills on private international law. Under this circumstance, directly adding the closest connection principle will result in more mistakes in judging.

It shall be noted that the principle of closer connection shall be paid more attention to and could leave more space for use, while the methods of providing more power to the closest connection principle are not limited to adding it into Art.43 of LAL. What's more, the reason for ensuring this principle is related to the protection of the weaker party, i.e., the employee, which will be discussed further in the following chapter 5.1.5.

5.1.4 Making clear distinguishment of the different mandatory rules

It is suggested to distinguish the following different mandatory exceptions: 1) the protection provision that could not be abrogated by party's choice, whose impact is to preclude the illegal party's choice; 2) the overriding mandatory provision that shall be applied at priority, whose impact is that they shall be considered first; and 3) the public policy concerns that shall be inspected with the applicable law determined by the choice of law rules, whose impact is to preclude the application of foreign law and to apply the law where the court locates.

The first type of mandatory exception, i.e., objectively applicable laws, is not in the Chinese rule design currently, which is suggested to be added in Chapter 5.1.1. The other two exceptions exist in LAL already. However, as discussed above, the overriding mandatory provisions in China cause controversy as there are different understandings about the range of "mandatory provisions related to the protection of rights and interests of laborers". The problem leads to different interpretations on the applicability of PRC Labor Contract Law to foreign workers and even the applied range of choice of law rules because, with no clear interpretation, the PRC domestic law would be recognized to be applied in all employment-related disputes as all the employment-relevant laws and regulations will be recognized as in the range of mandatory provisions. Such an idea conflicts with the original intention of private international law. Unfortunately, there are still many scholars, judges, and legal practitioners holding such ideas to deal with practical cases.

5.1.5 Protecting the weaker party

There are many ways to protect the employees in private international law. One old saying question is the application of party autonomy in choice of law. The limits on the party's choice are typical reflections of protection for the weaker party. In the countries where the party's choice is allowed, one way is to limit the chosen scope, i.e., limiting the closable law scope. For example, Swiss stipulates that the parties shall only choose applicable law between the law of the place where the employee or employer habitual locates, or the employer's business place.[158] Another way is to limit the form of party autonomy, i.e., the choice of law shall be made expressly.[159] On the other hand, one extreme way is to forget the party autonomy and the closest connection and to directly apply the law of the place where the employee habitually lives in.[160] This way is completely different from the rules for the general contracts.

Another big discussion about the weaker party protection is the rule design of the closer connection principle. Take the Rome I Regulation in EU as an example, in the absence of party's choice, the law of the relevant places may be considered as the applicable law, which

[158] Swiss Federal Act on Private International Law of 18 December 1987, in effect as from 1st January 2017. Art.121(3): "The parties may submit the employment contract to the law of the state in which the employee has his or her habitual residence or in which the employer has its place of business, domicile or habitual residence."
[159] E.g., the statute on Private International Law in Austria in 1978.
[160] Wang, Q. (2009).

includes the worker's habitual place of work, the place of business of the party engaging contracts with the employee, etc. Also, the law of the place where it has a closer connection with the contract, falling into the range of Art.8(4), may work as the applicable law following the principle of the closest connection. From the perspective of rule design, in most of the cases, the employee's working place or the employer's business place has a closer connection with the contracts. Although without any express mention, the closest connection principle has already been introduced behind the rule design. What's more, Art.8(4) plays a role as the "correction clause", which is to avoid the situation that the decided law eventually has not the closest connection with the contract.[161]

If we look back to China's protection for the weaker party, it is easy to see that there is only one clause mentioning the "weaker party": Art.25 of LAL, which deals with the disputes in family law.[162] In this provision, LAL includes the weaker party in the family dispute, e.g., the old parents or young children, as the "weaker party". However, such protection is not exactly the term "weaker party" we discussed in the inequal contract relationship.

Even though there is no specific principle of protecting the weaker employer or consumer, the examples conveying such an idea could be found in the LAL, e.g., the mandatory provisions. However, the lack of party autonomy and the impractical principle of closer connection is still main issues in China if they want to improve their protection for the employees. First, from the perspective of employee protection, party autonomy is a "passive protection" as it plays a role in preventing the worst situations.[163]. Indeed, party autonomy may bring negative consequences to the employees due to the unequal position. However, it is too abrupt to deny the whole agreement between the parties because of only one tiny impact. We shall observe the negative consequences separately. For those consequences not too much impacting employee's right and interests, i.e., those with no violation of laws or moral requirements, they are to some extent acceptable, as the protection for the employee is not absolute and unconditional.[164] Too much deny will impact the goal to search for legal certainty and predictability. Second, due to lack of the final "correction clause" or a

[161] Wang, J. (2015). 102.
[162] Article 25 of LAL: "The laws at the mutual habitual residence shall apply to the personal and property relations between parents and children; if there is no mutual habitual residence, the laws in favor of protecting the rights and interests of the weak in the laws at the habitual residence or of the state of nationality of one party shall apply."
[163] Wang, J. (2015). 101.
[164] Ibid.

practically introduced clause to ensure the application of the law of the place which has the closest connection to the contract, theoretically, it deteriorates the rigidity and lack of a valve to prevent the wrong application.

Finally, the rules of mandatory provisions, as discussed above in chapter 5.1.4, are remaining to be modified. To design a comprehensive and mature rule in the exception, i.e., the objectively applicable law, the overriding mandatory provisions, etc., is also an important method to ensure the protection for the weaker party. It is important to keep in mind that the use of exception shall be strict to avoid unnecessary impact on the law's authority and to prevent abusing use.

5.1.6 The rules for the posted worker

The terms "posted worker" mentioned in the EUPIL and China's LAL are in different ways. The posted worker in the EU refers to all the workers posted to different countries, no matter who is the posting unit and in which form of posting, while in China, LAL only mentions the labor dispatch workers, which refers to those posted to other countries by the "dispatching unit", which shall have the administrative entrustment. Besides the labor dispatch, there are also workers in the international cooperation project and workers employed by foreign individuals.

With the comparison, it is easy to find that there are still groups of workers out of the applied scope of LAL. These groups of workers have special characteristics and shall be distinguished from the general employees, but still lack specific rules designed for them. It is significant to take these groups of employees also into consideration when designing a different alternative way for them.

On the other side, in the author's opinion, the rule that adds the law of the place where the posting is conducted as another applicable law in addition to the employer's main business place is not that practically necessary, as the posting place in most of the circumstances are the same place where the employer has its main business. Therefore, it is necessary to provide a clear rule for the posted workers.

5.1.7 Distinguishing choice of law rules in the individual employment contract from the collective agreement

As analyzed in the previous chapters, there is no specific mention of the collective agreements. The provisions in the LAL simply apply the rules to all the "employment contract", which do not distinguish the individual employment contract from the collective agreement. This could partly be caused by the low awareness of collective agreement in China, where people have not enough consciousness to pay attention also to the collective agreement and they simply consider the employment contract only refers to the individual employment contract. On the other hand, one could conclude from the literary meaning that the law intends to apply the same choice of law rules also in the collective agreement. However, this interpretation is too abrupt and does not take into deep consideration the rules design logic behind the literary meaning.

The disputes arising from the transnational collective agreements have mainly two categories: one is that the collective agreement's scope is extended, and disputes occur during the process of the collective agreement's extension; the other is about applying the collective agreement to some foreign-related workers, e.g., the posted workers to different countries.[165] Therefore, the concerned factors and situations are different in the collective agreement, which shall follow an extremely different way from the individual employment contract. Accordingly, it is significant to design the choice of law rules separately for the individual employment contract and the collective agreement. It is suggested that China's LAL shall make clear distinguishment and clarify that the rules are only applied for the individual employment contract, as what the EU Rome I Convention does.

To come to a short conclusion, with years of academic theory and case experience, the rule design in a series of laws and the interpretation by the CJEU provides many learnable suggestions for China. However, as law transplant is not a simple process, we shall also pay attention to the possibility and feasibility through analyzing the relevant important factors. Some of the suggestions, e.g., introducing the party autonomy and providing practical use of the closest connection principle, are not much likely to be accepted in the current situation. But it is important to admit the advantages and necessity, and keep them in mind to seek a suitable way to be implemented in the future.

[165] Sun, G. (2017).

5.2 Other concerns

In such international environments, the choice of law rule in China is influenced by many other external factors. Simultaneously, China is now meeting many changes, e.g., the newly effective PRC Civil Code, the popular project of One Belt One Road since 2013, etc. This section will propose more concerns about the relationship between the private international law in China and the significant external influence.

5.2.1 PIL and PRC Civil Code

The relationship of the civil law code and the private international law is an old saying question in the development of private international law. The countries around the world have different ways of dealing with the relationship between the two. For example, Canada[166] incorporates the private international law into their civil law code as one chapter or section; the private international law in Japan[167] is established in one law separate from the civil code, while such private international law only includes the choice of law rules; and Swiss uniforms all matters into one comprehensive private international law code separately from the civil law code, which include the jurisdiction, choice of law, recognition, and enforcement of a judgment, and international commercial arbitration. Different countries treat the relationship between the PIL and civil code according to their country's actual situation.[168]

China published the PRC Civil Code (PCC) in 2020, which takes the relationship between PIL and civil code in China into a new stage. As mentioned before, before the LAL, the private international law mainly exists in the substantive civil and commercial laws with the form of separate provisions. Especially, the GPCL and its interpretation leave a long paragraph for series of private international law rules. In around 2010, it is during the discussion of establishing the civil law code that the LAL is proposed and approved. However, the separate LAL does not constitute a private international law code separately from the substantive civil law, as there are also some effective private international law rules in the GPCL not covered by the LAL.[169] That is to say that private international law is not completely separate from substantive civil law.

[166] E.g., Civil Code of QUÉBEC 1991.
[167] The Act on the General Rules of Application of Laws in Japan, originally enacted in 1898, was comprehensively revised in 2006, effective as of 1 January 2007.
[168] Ma, Z. (2020).
[169] Ding, W. (2019). 32.

The establishment of the PCC officially announces the separation of PIL and the substantive civil law, as the GPCL and other civil and commercial laws are replaced by the comprehensive civil code, and the provisions about the private international law in the civil laws are abolished. Therefore, the PIL in China is now separate from substantive civil laws. The reasons to separate the PIL from PCC mainly include:[170] 1) the civil code mainly deals with the domestic civil relationship, while the choice of law treats the matters in the international or foreign-related civil relationship. So the scope and objects of these two are different. 2) the civil code is a substantive law, while the choice of law is part of the conflict of law. 3) the goal of choice of law is to decide the applicable law, which may be the domestic civil law, i.e., PCC. It is illogical to put the choice of law into the chosen domestic law. Therefore, China endeavors to separate the choice of law rules from the PCC. There is not a specific chapter about private international law in the PCC.

On the other hand, although the PCC endeavors to separate the substantive law and the conflict of law, some provisions are indicating the foreign-related factors.[171] One of them is the limitation of actions for the disputes arising from the international sales of goods or contracts for technology imports and exports. Such disputes have foreign-related factors, while Art.594 of PCC stipulates that the limitation of actions is 4 years, which is longer than the general limitation of actions: 3 years. Besides, the PCC also stipulates the rules for adoption by foreigners and overseas Chinese.[172]

To look forward to the development of private international law and its relationship with the PCC, China's choice is to set a private international law code including the system of jurisdiction, choice of law rules, and the recognition and enforcement of a foreign judgment or arbitral award, which could keep pace with the PCC.[173] With the establishment of PCC, it is also suggested by some scholars to reorganize the LAL to update with the civil code and to utilize the chance to improve the rule design.

[170] Shen, J. (2021, March 1).
[171] Ibid.
[172] Art.1098,1099,1109 of PCC.
[173] Ding, W. (2019). 35.

5.2.2 PIL and China's new economic and investment policies

The political factor leads to great influence on the development of private international law of a country. In China, many new policies would affect transnational employment management as well as the application of choice of law rules.

One significant policy in recent years is the One Belt One Road Initiative (OBOR) issued by China since 2013. With the increasing overseas investment and the cooperation with other countries, for example in the form of foreign labor service cooperation, etc., labor disputes arising more frequently from the transnational employment contracts. Most of the conflicts occur due to the countries' different principles in employment management. Another reason for the increasing disputes is due to the flaws of China's choice of law rules design, which is too obscure to determine an appropriate way in application. For example, the principles of closest connection and party autonomy are practically impossible to be used, the mandatory provisions are attaching too much power, etc.[174]

To meet the trend of increasing global cooperation and international communication, the private international law in China shall develop by placing the whole "global society" as the most important value rather than focusing on its own country's interest.[175] In 2018, the chairman of China Xi Jinping announced to "work to build a community with a shared future for mankind". To achieve a global society, it is significant to obey the principles that are commonly recognized by the international society and not to infringe the common interest of the international society.[176] It requires that the countries shall not only work for their interests but also to consider their action's impact on the common interest of the whole human being.[177]

To ensure the protection for the goal of mankind, a united international law system is necessary. Nowadays, more and more new substantive laws which directly regulating the international civil and commercial relationship are impacting the conflict of law's role and function. The OBOR requires a new legal rule system for such change,[178] which shall

[174] Wang, J. (2018). 16.
[175] Li, S. (2019). 70.
[176] Li, S. (1993).
[177] Li, S. (2019). 70.
[178] Li, S., Zheng, Y., & Lv G. (1997).

develop and make creative changes based on the current economic and commercial relationship, rather than completely denying the current scheme.[179]

5.2.3 China's lack of foreign-related employment protection rules specific for overseas workers

China's protection method for the overseas workers currently mainly depends on the intervene by the Ministry of Foreign Affairs, [180] i.e., depending on the authority power of the government which leads the relevant departments and the enterprises to work on dealing with the massive disputes and protecting the right and interest of the overseas workers. However, it is not enough to focus on diplomatic and consular protection, as their protections are not instant and comprehensive, and there will be still many labor disputes of the overseas workers that would not be solved.

The current laws and regulations concerning the protection of overseas workers are not enough. Even though there are some administrative rules, e.g., *Regulation on the Administration of Foreign Labor Cooperation*, they are all administrative regulations for the process of overseas labor service instead of protecting overseas workers' rights and interests. From the perspective of the legal power hierarchy, they are pure administrative rules which could not work as the law. On the other hand, the domestic employment law and employment contract law have not expressly announcement of their extending effectiveness outside China. Therefore, the two laws' direct application is questionable.

Inspired by the PWD in the EU, it is suggested that China could set a law specifically for overseas workers' protection. As the conflict of law issues, e.g., the jurisdiction, the choice of law, etc., could be dealt with in the LAL and its future updated version, the law for the overseas workers could decide some substantive issues, e.g., the basic labor right of getting rest and pay, the dispute resolution or remedies, the social security, and other allowance, etc.[181]

Especially, the overseas labor dispatched workers need more clear and practical protection provisions than the ordinary dispatching within China. For example, it is necessary to

[179] Li, S. (2019). 71.
[180] Wang, H. (2016). 160.
[181] Sun, G. (2013). 63.

provide different remedies possibilities for overseas workers in labor disputes. The situation now is that although the overseas workers have disputes with the overseas enterprises, they would claim back to the labor dispatch service provider in China, because they don't have full knowledge about the dispute resolution or judicial situation in the countries, as well as the high legal cost and the language barrier. However, since the receiving enterprise overseas is the actual party of the dispute with more connection to the disputes, rather than the labor dispatch service provider in China, the cases in China could not get in touch of the real issue of the dispute, and the judgment could not form legal obligation for the overseas enterprises. Some new remedies methods could be designed, for example, to gather the three parties in the court of the place where the workers are working and to ensure the enforcement of the judgment to all parties. Such new methods may increase flexibility and at the same time provide more practical protection to overseas workers. Also, it is suggested to consider modifying the PRC labor law and employment contract law, especially to make a change to their extending effectiveness towards the territory outside China. [182]

5.2.4 Choice of law rules and new challenges by the Covid-19

The pandemic since 2019 brings changes to many factors in people's lives all around the world. Especially in the labor and employment field, the impact by the Covid-19 influences almost all items in work. For example, the popular remote working method brings problems in daily management, e.g., OT management, work performance evaluation, etc.

In the private international law field, the new work form and the new management method caused by the pandemic would leave a continuous influence on the employment market. Especially, the protection for the transnational dispatching worker will need further attention. One of the concerns about the choice of law rules is about determining the working place in the dispute cases, as remote working is a new method popular in many countries in this special time. This would leave less impact for the international transport workers, as their work is difficult to finish through remote working. However, for those who normally work in different countries but now are working remotely at home, where shall be their habitual place of work? They are remaining to answer and need further clarification through case law in special situations.

[182] Ibid, 67.

6. Conclusion

The choice of law rules to the transnational employment contract seems to be only one small section in the private international law field. However, it is a significant stage with the requirement to consider many factors in the cases. The private international law rules and structures are extremely related to the countries' real situation and the background from the perspective of history, culture, and economy.

China's rules, organized by the LAL, show its characteristic of administrative management, which prevent the party's choice in malice to avoid the mandatory requirements, and use some mandatory methods to ensure the protection for employees, e.g., abruptly preventing the party autonomy, directly applying the Chinese mandatory provisions, etc. Theoretically, such methods are following some advantageous countries' rules, which have the original intention to provide better protection. However, due to the flaw of rules design, they could not work or implement as intended and, in turn, they impact the legal certainty and predictability.

On the other hand, through analyzing the implementation situation of LAL in China since the establishment of 2010, practical issues are found: judges and legal practitioners in China still lack awareness of PIL; The society needs more instruction about implementing the LAL. Such a situation is also reflected in the empirical study of the thesis, where the LAL was not appropriately cited in judgments of disputes about the transnational employment contracts, or the judges and legal practitioners directly overlooked the choice of law problems.

Many practical issues are also found in this thesis about the implementation of choice of law rules in China. For example, people make mistakes in understanding the relationship between the general rules and the rules for the employment contracts; mistakes in understanding the definition of mandatory provisions; problems to deal with the cases of foreign workers in China, etc.

Comparing with the rules from the EU, it is easy to find the flaw of China's rule design. EU's rules, in the essence, have the same or similar intention as China, but with some improved and better rule design. For example, it has more clear logic and ways to clarify the implementation. First, it allows the party autonomy, while using the directly applied

provisions to avoid the bad impact. This way could also work to give the same influence to prevent the inappropriate results from the unequal position. Second, it has a more clear definition and methods to clarify the rules, e.g., how to solve the problems from more than one working place, the problems of international transport workers, more clear ways to define the business place of the company, etc. Third, it introduces the closest connection principle in the employment contract, instead of leaving it in the general principle and with no practical use.

Due to the above discussion, some suggestions are provided for China to improve its rule design, which could learn from the EU, e.g., it is suggested to clarifying the obscure terms, distinguishing the different mandatory provisions, polishing the rules for the labor dispatching workers, etc. Some suggestions, e.g., to introduce the party autonomy in the choice of law rules or to put the closest connection directly to Art.43 of LAL, are less likely to be accepted or are not suitable to be implemented currently. However, it is significant to understand and remember their advantages.

On the other hand, the choice of law rules would meet more challenges from many external aspects: the increasing opportunity and challenges due to the implementation of the One Belt One Road Initiative, the great impact by the Covid-19, etc. What's more, the amendment of LAL is necessary to meet the newly established Civil Code of China.

Through the observation and discussion in the thesis, although there is still a long way to go to improve the choice of law rules to the transnational employment contracts in China, from the practical aspect, we shall be positive to believe that with more cases and the increasing awareness in China, the implementation and interpretation of LAL will be in a more appropriate way.

BIBLIOGRAPHY

Legislation

China

Civil Code of the People's Republic of China (issued on May 28, 2020; effective as of Jan.1, 2021.)

General Principles of the Civil Law of the People's Republic of China (first effective since Jan. 1, 1987; modified in 2009; abolished since Jan. 1, 2021.)

Interim Measures for the Participation in Social Insurance of Foreigners Employed in China (issued on June 9, 2011; effective as of Oct. 15, 2011.)

Interpretation (I) of the Supreme People's Court of Issues Concerning the Application of Law in the Trial of Labor Dispute Cases (issued on Dec. 29, 2020; effective as of Jan.1, 2021.)

Interpretations of the Supreme People's Court on Several Issues Concerning Application of the Law of the People's Republic of China on Choice of Law for Foreign-Related Civil Relationships (I) (effective as of Jan.7, 2013; modified on Dec. 29, 2020.)

Law of the People's Republic of China on the Laws Applicable to Foreign-related Civil Relations (issued on Oct. 28, 2010; effective as of Apr. 1, 2011.)

Labor Contract Law of the People's Republic of China (issued on June 29, 2007; modified on Dec 28, 2012; newly effective as of Jul. 1, 2013.)

Labor Law of the People's Republic of China (first issued on May 7, 1994; newly modified on Dec. 29, 2018.)

Maritime Law of the People's Republic of China (issued on Nov. 7, 1992; effective as of Jul. 1, 1993.)

Opinions of the Supreme People's Court on Certain Issues Concerning the Implementation of the 'General Principles on the Civil Law of the People's Republic of China' (Trial) (effective since Apr. 2, 1988; modified in 2009; abolished since Jan. 1, 2021)

Provisions on Several Issues Concerning Trial of Cases Involving Seaman-related Disputes (issued on Sept.27, 2020; effective as of Sept. 29, 2020.)

Provisions on the Employment of Foreigners in China (First issued on Jan. 22, 1996; modified on Nov. 12, 2010 and Mar. 13, 2017; newly effective as of Mar. 13, 2017.)

Regulations of the People's Republic of China on Administration of the Entry and Exit of Foreigners (issued on Jul. 12, 2013; effective as of Sept.1, 2013.)

Regulation on the Administration of Foreign Labor Cooperation (issued on June 4, 2012; effective as of Aug. 1, 2012.)
Rules on the Relevant Issues concerning the Application of Law in Hearing Foreign-Related Contractual Dispute Cases in Civil and Commercial Matters (issued on Jul. 23, 2007; effective since Aug. 8, 2007; abolished since Apr. 8, 2013.)

Other Countries

Act on the General Rules of Application of Laws in Japan
Civil Code of QUÉBEC 1991
Private International Law in Austria in 1978, i.e., Bundesgesetz vom 15. Juni 1978 uber das international Privatrecht (IPR-Gesetz)
Swiss Federal Act on Private International Law
Trade Union and Labor Relations (Consolidation) Act 1992

European Union

Brussels Convention 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (Consolidated version CF 498Y0126(01)). OJ L 299, 31.12.1972, p. 32–42
Convention 80/934/EEC on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980, OJ C 27, 26.1.1998, p. 34–53
Directive 1996/71. *The posting of workers in the framework of the provision of services*. European Parliament, Council of the European Union. http://data.europa.eu/eli/dir/1996/71/oj
Directive 2014/67. The enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (the IMI Regulation). European Parliament, Council of the European Union. http://data.europa.eu/eli/dir/2014/67/oj
Directive 2018/957. Amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. European Parliament, Council of the European Union. http://data.europa.eu/eli/dir/2018/957/oj
Regulation 44/2001. *The jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.* European Parliament, Council of the European Union. http://data.europa.eu/eli/reg/2001/44/oj

Regulation 593/2008. *The law applicable to contractual obligations (Rome I).* European Parliament, Council of the European Union. http://data.europa.eu/eli/reg/2008/593/oj

Regulation 864/2007. *The law applicable to non-contractual obligations (Rome II).* European Parliament, Council of the European Union. http://data.europa.eu/eli/reg/2007/864/oj

Regulation 1215/2012. *The jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.* European Parliament, Council of the European Union. http://data.europa.eu/eli/reg/2012/1215/oj

Court Judgments

Anton Schlecker v. *Melitta Josefa Boedeker*, CJEU judgment, 12 September 2013; AG Opinion, 16 April 2013, nyr, Case C-64/12

Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL (C-369/96) and Bernard Leloup, Serge Leloup and Sofrage SARL (C-376/96) [1999] ECR I-8453; [2001] ICR 434, Joined Cases C-369/96 and C-376/96

Eurofood IFSC [2006] ECR I-3813, Case C-341/04

Giulia Pugliese v. *Finmeccanica SpA, Betriebsteil Alenia Aerospazio* [2003] ECR I-3573; [2004] All ER (EC) 154, Case C-437/00

Greek Republic v. Grigorios Nikiforidis, EU:C:2016:774, Case C-135/15

Heiko Koelzsch v. *État du Grand Duchy of Luxemburg* [2011] ECR I-1595, Case C-29/10

Herbert Weber v. *Universal Ogden Services Ltd*. [2002] ECR I-2013; [2002] QB 1189, Case C-37/00

Monterosso Shipping Co., Ltd. v. *ITF* [1982] ICR 675

Mulox IBC Ltd. v. *Hendrick Geels* [1993] ECR I-4075; [1993] ILPr 668, Case C-125/92.

Jan Voogsgeerd v. *Navimer SA* [2011] ECR I-13275, Case C-384/10

Rutten v. *Cross Medical Ltd* [1997] ECR I-57, Case C-383/95

Shekar v. *Satyam Computer Services Ltd*. [2005] ICR 737

United Antwerp Maritime Agencies (Unamar) NV v. *Navigation Maritime Bulgare*, CJEU judgment, 17 October 2013; AG Opinion, 15 May 2013; nyr, Case C-184/12

Books

Grušić, U. (2015). *The European private international law of employment*. Cambridge University Press.

Han, D. (2000). *Private International Law in 7th-9th.*

Huang, J. & Jiang, R. (2011). *Zhonghua renmin gongheguo shewai minshi guanxi falv shiyongfa shiyi yu fenxi* [Interpretation and Analysis of Law of Law Application of Foreign Civil Relations]. Beijing: Falv chubanshe.

Qi, X. (2011). *Shewai minshi guanxi falv shiyongfa yuanli yu jingyao* [Principles and Essentials of Law of Law Application of Foreign Civil Relations]. Beijing: Falv chubanshe.

Tu, G. (2016). *Private international law in China* (pp. 2-3). Singapore: Springer.

Xie, Z. (2015). *Labor law in China: Progress and challenges*. Springer.

Journal Articles

Bochove, L. M. V. (2014). Overriding mandatory rules as a vehicle for weaker party protection in European private international law. *Erasmus L. Rev.*, *7*, 147.

Czerwiński, M. (2015). The law applicable to employment contracts under the Rome I-Regulation. *Przegląd Prawniczy Uniwersytetu im. Adama Mickiewicza*, (5), 147-162.

De Boer, T. M. (2008). Unwelcome Foreign Law: Public Policy and Other Means to Protect the Fundamental Values and Public Interests of the European Community. in Malatesta, A., Bariatti, S., & Pocar, F. (2008). The External Dimension of EC Private International Law in Family and Succession Matters. Cedam.

Ding, W. (2019). Minfadian bianzuan cuisheng 2. shewai minshi guanxi falv shiyongfa [The Establishment of Civil Code Encouraging the Second Version of LAL]. *Dongfang Faxue*, 1.

Fornasier, M., & Torga, M. (2013). The Posting of Workers: The Perspective of the Sending State–The Judgment of the Civil Chamber of the Estonian Supreme Court of 16 January 2013 No 3-2-1-179-12. *European Journal of Labour Law (EuZA)*, *6*(3), 356-365.

Giuliano, M., & Lagarde, P. (1980). Report on the Convention on the law applicable to contractual obligations. *Official Journal* C 282, 31 October 1980.

Grušić, U. (2013). Should the Connecting Factor of the Engaging Place of Business Be Abolished in European Private International Law. *Int'l & Comp. LQ*, *62*, 173.

Guo, L. (2016). Shewai laodong hetong zhong zhijie shiyong defa zhi shiyong wenti yanjiu [The Research on the Implementation of Objectively Applicable Provisions in Transnational Employment Contract]. *Qiye Jishu Kaifa*, 20.

Guo, Y. & Fan, J. (2013). Shewai minshi guanxi falv shiyongfa de shiyong jiqi fansi [The Application and Concerns of the LAL]. *Shehui Kexue*, 2, 42-47.

He, Q. (2010). China's private international law (1978–2008). *Frontiers of Law in China*, *5*(2), 188-214.

Huo, Z. (2011). Highlights of China's New Private International Law Act: From the Perspective of Comparative Law. *RJT ns*, *45*, 637.

Krebber, S. (1999). Conflict of laws in employment in Europe. *Comp. Lab. L. & Pol'y J.*, *21*, 501.

Li, S. (1993). Guoji sifa de qutonghua wenti – zhongguo yu guoji sifa tongyihua jincheng xuyan [The Trend of Private International Law: Preface of the *Unification of China's Private International Law*]. *Faxue Pinglun*, 1.

Li, S. (2019). Yidai yilu changyi xia guoji sifa linian de xin fazhan New Development of the Private International Law Idea Under "the Belt and Road" Initiative]. *Shanxi Shifan Daxue Xuebao: Zhexue Shehui Kexue Ban,* 2.

Li, S., Zheng, Y., & Lv G. (1997). Guanyu jianli guoji minshang xinzhixu de falv sikao – guoji sifa jiben gongneng de shenceng kaocha [Research on Establishing New Order of International Civil and Commercial Relationship: Deep Observation of the Fundamental Function of Private International Law]. *Faxue Yanjiu*, 2.

Liu, R. (2013). Zhijie shiyong defa zai woguo de shiyong-jianping shewai minshi guanxi falv shiyongfa jieshi yi dishi tiao [The Implementation of Objectively Applicable Provisions in China: Research on Art.10 of LAL Interpretation]. *Doctoral Dissertation.*

Luo, F. (2018). Woguo shewai laodong hetong falv shiyong guize tanxi [Study of the Conflict Rules about Employment Contract]. *Chengdu Ligong Daxue Xuebao Shehui Kexue Ban*, 4

Ma, Z. (2020). Minfadian bianzuan beijing xia guoji sifa de lifa faxiang [The Direction of Private International Law under the Background of Establishing Civil Code]. *Dangdai Faxue,* 3.

Pu, L. (2013). Guoji sifa zhong qiangzhixing guifan de jieding, jianping guanyu shiyong shewai minshi guanxi falv shiyongfa ruogan wenti de jieshi yi dishi tiao [The Boundary of Mandatory Provisions in Private International Law: Research on Art.10 of LAL Interpretation]. *Doctoral Dissertation.*

Rammeloo, S. (2017). 'From Rome to Rome'–Cross-border employment contract. European Private International Law: Intertemporal law and foreign overriding mandatory laws: Case C-135/15 Greek Republic v. Grigorios Nikiforidis, EU: C: 2016: 774. *Maastricht journal of European and comparative law*, *24*(2), 298-322.

Riesenhuber, K. (2012). European employment law: a systematic exposition. *Cambridge.*

Sun, G. (2013). Woguo haiwai laogong falv baohu zhi jianshi [On Safeguarding China's Overseas Posted Worker's Rights and Interests]. *Doctoral Dissertation.*

Sun, G. (2015). Lun laodongfa shangde qiangzhixing guifan [Research on the Mandatory Provisions in Labor Law]. *Faxue*, 9, 48-65.

Sun, G. (2017). Lun shewai laodong hetong zhunjufa zhi queding [Research on the choice of law to the foreign-related labor contracts]. *Faxue*, 9.

Van Hoek, A. A. (2014). Private international law: an appropriate means to regulate transnational employment in the European Union. *Erasmus L. Rev.*, *7*, 157.

Wang, H. (2016). Woguo haiwai laogong quanyi lifa baohu yu guoji xietiao jizhi yanjiu [Research on Law Protection and International Coordination Scheme of Right and Interest of Chinese Overseas Workers]. *Jiangsu Shehui Kexue*, 3.

Wang, J. (2015). Lun baohu laodongzhe liyi de guoji sifa fangfa [Legal Study on Private International Law Approach of Laborers' Profits Protection]. Hubei Daxue Xuebao: Zhexue Shehui Kexue Ban, 42(6), 100-104.

Wang, J. (2018). Yidai yilu beijing xia guoji falv chongtu de leixinghua ji xietiao fenxi [The Analysis of Types and Coordination of International Conflict of Law under the Background of OBOR]. *Fazhi Yu Jingji*, 2.

Wang, Q. (2009). Woguo shewai hetong falv shiyong de xin fazhan – zuigao renmin fayuan guanyu Shenli shewai minshi huo shangshi hetong jiufen anjian falv shiyong ruogan wenti de guiding [Latest Development on Application of Law of Foreign-Related Contracts in China]. *Xinjiang Daxue Xuebao: Zhexue Renwen Shehui Kexue Ban*, 3.

Wu, W. (2013). Woguo jiuye de waiguoren laodong zhengyi anjian shiyong laodongfa zhi nandian [The Difficulties of Applying PRC Labor Law in the Labor Dispute Cases of Foreign Workers in China]. *Faxue*, 6

Xu, Q. (2017). Lun woguo laodong hetong chongtufa de sifa jieshi [On the Judicial Interpretation of the Conflicts Rule for Employment Contracts in China]. *Faxue luntan*, 4.

Yang, Y. (2014). Cong ouzhou fayuan zuixin panli toushi luoma gongyue diliutiao dui laodongzhe de baohu [Case Study on the Protection to the Workers by Art.6 of Rome Convention]. *Jingji Yanjiu Daokan*, 28.

Zeng, P. (2020). Jiyu woguo shewai laodong hetong falv shiyong guize yanjiu [Research on the Rules of Choice of Law to Foreign-related Labor Contracts in China]. *Qiye Gaige yu Guanli*, 16.

Zhang, M. (2005). Choice of law in contracts: a Chinese approach. *Nw. J. Int'l L. & Bus.*, *26*, 289.

Zhang, M. (2011). Codified Choice of Law in China: Rules, Processes and Theoretic Underpinnings. *NCJ Int'l L. & Com. Reg.*, *37*, 83.

Zhao, Y. (2020). Zhongguo fayuan shiyong laodong hetong falv shiyong guize zhi shizheng yanjiu [An Empirical Study on the Application of Law of Labor Contracts in Chinese Courts]. *Wuhan Daxue Guojifa Pinglun*,1.

Zhou, G., Liang, H., & Cheng, X. (2016). Shewai laodong guanxi quanli yiwu de chuli [Settlement of Disputes on Foreign-related Employment Relationship]. *Zhongguo Laodong*, 5

Online Reports

Ministry of Commerce of the People's Republic of China. (2011). *Brief Statistics of China's Foreign Labor Service Cooperation in 2010*.
http://english.mofcom.gov.cn/article/statistic/foreigntradecooperation/201101/20110107386827.shtml

Ministry of Commerce of the People's Republic of China. (2020). *Brief Statistics on China's Overseas Labor Service Cooperation in 2019*.
http://english.mofcom.gov.cn/article/statistic/foreigntradecooperation/202002/20200202933531.shtml

Ministry of Commerce of the People's Republic of China. (2021). *Brief Statistics on China's Overseas Labor Service Cooperation in 2020*.
http://hzs.mofcom.gov.cn/article/date/202101/20210103033291.shtml

Ministry of Human Resources and Social Security of the People's Republic of China. (2012). *Statistics Report 2011*.
http://www.mohrss.gov.cn/SYrlzyhshbzb/zwgk/szrs/tjgb/201206/t20120605_69908.html

National Bureau of Statistics of China. (2011). *Tabulation on the 2010 Population Census of the People's Republic of China.* China Statistics Press.
http://www.stats.gov.cn/tjsj/pcsj/rkpc/6rp/indexch.htm

Shanghai Bureau of Statistics. (2020). *Shanghai Statistical Yearbook of 2019*.
http://tjj.sh.gov.cn/tjnj/20200427/4aa08fba106d45fda6cb39817d961c98.html

Supreme People's Court of PRC. (2012). *Work Report by the Supreme People's Court of PRC in 2010*. http://www.gov.cn/test/2012-11/13/content_2264068.htm

Supreme People's Court of PRC. (2021). *Work Report by the Supreme People's Court of PRC in 2020*. http://www.court.gov.cn/zixun-xiangqing-231301.html

Online Articles

China National Radio. (2021, February 15). *2018nian zhongguo leiji fafang waiguo rencai gongzuo xukezheng 33.6 wan fen* [China accumulatively issued 336 thousand foreign work permits in 2018]. http://china.cnr.cn/news/20190415/t20190415_524577388.shtml

Huang, S. (2021, March 1*). Zhaoyong waiji renyuan hegui guanli: cong Beijing shanghai anli tanqi* [Compliance Management of Foreign Workers: Case Study of Beijing and Shanghai]. Laodong Fayuan. http://www.laodongfa.com/index/show/id/70527.html

KPMG. (2021, March 25). *Podcast Transcript on the Revised Posted Workers Directive and its Impact on Global Mobility*.
https://assets.kpmg/content/dam/kpmg/xx/pdf/2020/06/revised-posted-workers-directive-and-its-impact-on-global-mobility.pdf

Shen, J. (2021, March 1). *Minfadian shewai guize* [Foreign-related rules in PRC Civil Code]. http://www.xinhuanet.com//globe/2020-06/11/c_139123256.htm